No. 88-333 (3)

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

v.

JAMES LEWIS SMITH,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Alabama

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
	CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
11/16/85	Respondent Indicted for Burglary, Rape and Sodomy.
1/6/86	Respondent's Guilty Plea Proceeding.
1/17/86	Sentencing Hearing wherein Respondent sentenced to thirty years on Burglary and Rape convictions.
3/17/86	Motion to Withdraw Guilty Plea.
3/17/86	Court's Denial of Motion to Withdraw Guilty Plea.
	ALABAMA COURT OF CRIMINAL APPEALS
7/15/86	Court's Opinion reversing trial court's refusal to allow withdrawal of guilty plea [Reported as *Smith v. State*, 494 So.2d 182 (Ala.Cr.App. 1986)].
	CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
8/4/86	Motion to Recuse Trial Judge.
8/12/86	Supplemental Motion to Recuse.
8/13/86	Hearing on Motion to Recuse and Denial.
8/22/86	Motion for new trial and denial of motion.
8/22/86	Sentencing hearing following jury verdict wherein Respondent's sentence to Life terms for burglary and sodomy and 150 years for rape.

Date	Proceedings
	ALABAMA COURT OF CRIMINAL APPEALS
5/26/87	Opinion affirming conviction and burglary and sodomy sentences.
	ALABAMA SUPREME COURT
4/8/88	Alabama Supreme Court opinion reversing burglary sentence but affirming conviction.
6/24/88	Denial of Petitioner's rehearing.
	ALABAMA COURT OF CRIMINAL APPEALS
1/27/89	Order on Remand from Alabama Supreme Court.
1/31/89	Order Staying Remand Pending Outcome in this Court.

Original Guilty Plea Proceedings
[Supplemental Record on Appeal]

(p. R-2) IN THE FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

State of Alabama Plaintiff,	)	CC-85-1683-PR
vs.	)	CC-85-1684-PR
James L. Smith, Defendant.	)	

* * * *

Whereupon, the following guilty plea occurred on January 6, 1986, and sentencing occurred on January 17, 1986, before the Honorable Judge Charles Price.

* * * *

APPEARANCES

For the Plaintiff
State of Alabama:

Hon. Randy James
Deputy District Attorney
15th Judicial Circuit
District Attorney's Office
Montgomery County Courthouse
Montgomery, Alabama

For the Defendant
James L. Smith:

Hon. Elno A. Smith, Jr.
Smith, Cruse & Law
201 Washington Court Building
25 Washington Avenue
Montgomery, Alabama

(p. R-3) (Whereupon, the following proceedings occurred it approximately 8:45 a.m. on January 6, 1986.[)]

THE COURT: Mr. James L. Smith. In 85-1683, you're charged with rape in the first degree.

MR. SMITH: All right.

THE COURT: In 85-1684, you're charged with sodomy in the first degree.

MR. SMITH: They are going to dismiss the sodomy.

THE COURT: Does he understand what he is charged with?

MR. SMITH: Yes, sir.

THE COURT: Is that your mother back there?

THE DEFENDANT: My friend.

THE COURT: She can come take a seat out here because I want her to listen to what you say. All right. Pull a chair up around here and feel comfortable.

Mr. Smith, I understand you are here – is there a motion on either case?

MR. JAMES: The State moves to nolle pross case 85-1682, the sodomy in (p. R-4) the first degree, in exchange for pleas.

THE COURT: Is the victim here? You want to bring her in?

MR. JAMES: No, sir.

THE COURT: Case 85-1682, sodomy in the first degree, the State's motion to nolle pross is hereby granted.

Now, Mr. Smith, I understand you want to change your plea from not guilty to guilty in case 85-1683 which is rape in the first degree, and also in case 85-1684 which is burglary in the first degree, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: You have to speak up. You are the one doing this because she has to take it down what you say.

How old are you?

THE DEFENDANT: Twenty-six.

THE COURT: How far did you go in school?

THE DEFENDANT: I received a G.E.D. which is equivalent to a high school education.

THE COURT: You read and write and understand the English language?

THE DEFENDANT: Basically.

(p. R-5) THE COURT: Do you have any limitations on that?

THE DEFENDANT: I have complications in certain things, in comprehending.

THE COURT: Such as what?

THE DEFENDANT: I can read pretty good and so forth, but you know, I have limitations.

THE COURT: We all have limitations. There are a lot of things I don't understand. I don't understand computer language. But you can read and write and understand English, can't you?

THE DEFENDANT: (Nods head to indicate the affirmative.)

THE COURT: You are not under the care of a psychiatrist, are you?

THE DEFENDANT: Not as I know of.

THE COURT: Well, you know whether you are under any psychiatric care or not.

THE DEFENDANT: No, sir.

THE COURT: Not that you know of. Are you receiving any psychiatric help?

THE DEFENDANT: No, sir.

THE COURT: Okay. Now, have you had any alcohol or any drugs within (p. R-6) the last twenty-four hours that render you incapable of having full control of your mental faculties this morning?

THE DEFENDANT: (Nods head to indicate the negative.)

THE COURT: Do you know what you're charged with?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you don't have to plead in either one of these cases? You have the right to a trial by jury in each one of these cases, and if the Court finds that these two cases arise out of the same factual situation, I can consolidate the cases for trial and you'll have one trial at one time for these cases. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you have a jury trial, that means a certain number of citizens from Montgomery County would be summoned for jury duty, and they are already here. They are waiting around in the jury assembly room. I will bring (p. R-7) them around here, and from that number, twelve persons would be selected to sit as a jury in your case. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you and your lawyer and the prosecutor, and the Court, to a certain extent, will participate in the process of selecting the jury. and the D.A. and your lawyer will select twelve people to try your case.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you understand that[?]

THE DEFENDANT: Yes, sir.

THE COURT: If you waive a jury trial and I accept that waiver, then you have a right to a trial before me without a jury.

THE DEFENDANT: Yes, sir.

THE COURT: Now, in either case, the burden is on the State of Alabama to prove your guilt beyond a reasonable doubt and to have a moral certainty. And if you have a jury trial and the State meets that burden, the jury would be authorized to find you guilty; (p. R-8) so would I, if you have a trial before me alone. On the other hand, if the State fails to meet their burden, then the jury would

be authorized to find you not guilty; so would I, if you have a trial before me without a jury and the State fails to meet their burden.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you have a trial, you have the right to elect whether or not you testify. If you have a jury trial and you elect not to testify, your lawyer, the prosecutor, nor I can comment to the jury about the fact that you elected not to testify. If you have a trial before me alone and elected not to testify, I wouldn't hold that against you.

THE DEFENDANT: Yes, sir.

THE COURT: If the State brings in witnesses to testify against you, you have the right to cross-examine those witnesses through your lawyer. If you have any witnesses you want to testify (p. R-9) on your behalf, you have the right to subpoena those witnesses through the Clerk's Office of the Court without any charge to yourself. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that – have you discussed these cases with Mr. Smith?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that any conversations you have had with Mr. Smith are confidential between the two of you, and I wouldn't call upon him to disclose to me or to anyone else anything about your involvement in these cases?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you come into Court presumed to be innocent, and that presumption attends you until the State proves your guilt beyond a reasonable doubt and to a moral certainty, to the satisfaction of a jury; to my satisfaction, if you have a trial before me without a jury; or until you convince me you are guilty by what you tell me here this (p. R-10) morning.

THE DEFENDANT: Yes, sir.

THE COURT: I have before me an Exhibit A, and I ask you to look at it.

THE DEFENDANT: (Complies.)

THE COURT: Is that your signature on there?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have an opportunity to go over this form with your lawyer before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand everything on it?

THE DEFENDANT: I believe so.

THE COURT: Well, do you have any questions about it?

THE DEFENDANT: I –

THE COURT: Well, Mr. Smith explained to you what this form was about, didn't he? And this form contains basically what I've told you. You have the right

to – you don't have to plead guilty, you have the right to cross-examine witnesses, you have the right to subpoena any witnesses you want to testify for you, you don't have to take the stand to testify unless you (p. R-11) want to, you will participate in the selecting of the jury. Mr. Smith went over all of that with you, didn't he?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about it?

THE DEFENDANT: I do have one.

THE COURT: Mr. Smith explained this, did he not?

MR. SMITH: Let me ask what the question is.

THE COURT: What question do you have?

THE DEFENDANT: I don't have any.

THE COURT: What question do you have?

THE DEFENDANT: I don't have any.

THE COURT: Go down and let him point out the question to you since he says he has one.

MR. SMITH: All right. I would be happy to.

(PAUSE.)

MR. SMITH: I answered his question.

THE COURT: What was it?

MR. SMITH: He wanted to know if he pled guilty, would you sentence him today. I told him no, that you would run a pre-sentence report.

(p. R-12) THE COURT: Of course, that wasn't on here.

Do you have any questions about that form?

(Defendant sways.)

THE DEPUTY: What is wrong with you?

THE COURT: Nothing. You have to hold your own.

Do you have any questions about this form?

THE DEFENDANT: No, sir.

(Defendant sways.)

THE COURT: Do you understand if you plead guilty in case number 85-1683, rape in the first degree, that I will be authorized to sentence you to ten years up to life in the penitentiary?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty in 85-1684, burglary in the first degree, I will be authorized to sentence you to ten years up to life in the penitentiary?

THE DEFENDANT: Yes, sir.

THE COURT: If you have any prior felony or felonies, of course, and the State moves the Court to invoke the Habitual Offender Act (p. R-13) and proves you have a prior felony or felonies, your sentence can be increased proportionately, based upon the classification of the prior felony or felonies?

THE DEFENDANT: Yes.

THE COURT: I have before me an Exhibit A, and I have already asked you if you have any questions about this form. Do you have any questions about the form now?

THE DEFENDANT: No, sir.

THE COURT: All right. Now, has anyone forced you to come in and say you're guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anybody offered you any money or anything of value to get you to say you're guilty?

THE DEFENDANT: No.

THE COURT: Has anybody told you if you pled guilty, it would be better on you,that I'd give you a light sentence or a particular sentence or give you probation or anything like that to get you to say you're guilty?

THE DEFENDANT: No.

THE COURT: Raise your right hand.

(p. R-14) (Defendant sways.)

THE COURT: You want to bring the jury around here? I am tired of putting up with him.

MR. SMITH: Let him get his breath.

(Pause.)

(Defendant sworn.)

THE COURT: All right. Well, if something is wrong with him, how did he get straight that quick?

MR. SMITH: Put your hand down. Let me ask some questions.

THE COURT: Let me ask. In case 85-1683, rape in the first degree, how do you plead?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: All right. You want to ask him the questions?

MR. SMITH: All right. I was going to ask him about the other one. There's a statement on that one.

THE COURT: All right. In case 85-1684, burglary in the first degree, how do you plead? That's 85-1684.

THE DEFENDANT: Guilty, Your Honor.

MR. SMITH: I'd like to ask him a few questions. Mr. Smith, on about September 14th, 1985, did you go (p. R-15) over to this girl's house whose name is Vicky, I believe, cut the screen and go in there and have sex with her?

THE DEFENDANT: (No response.)

MR. SMITH: Did you do that?

THE DEFENDANT: Sir?

MR. SMITH: Had you --

THE COURT: Did you go over to the lady's house, cut the screen, and have sex with her?

THE DEFENDANT: Yes.

THE COURT: What time of morning was it, or was it night?

THE DEFENDANT: It was night, sir.

THE COURT: Beg your pardon?

THE DEFENDANT: It was night, sir.

THE COURT: Nighttime?

THE DEFENDANT: Yes.

THE COURT: About what time of night?

THE DEFENDANT: I can't say, sir.

THE COURT: Well, what time?

MR. JAMES: It was 1:30 in the morning.

THE COURT: About 1:30 in the morning?

THE DEFENDANT: Yes.

THE COURT: Did anybody give you permission to go in the house?

THE DEFENDANT: No.

THE COURT: How did you get in the (p. R-16) house?

THE DEFENDANT: (No response.)

THE COURT: How did you get in the house?

THE DEFENDANT: (No response.)

THE COURT: How did you get in the house?

THE DEFENDANT: (No response.)

MR. SMITH: He cut the screen and went through the window.

THE COURT: How did you get in the house?

THE DEFENDANT: (No response.)

THE COURT: Let him tell me. How did you get in the house?

THE DEFENDANT: (No response.)

THE COURT: What street?

MR. JAMES: Haton Avenue.

THE COURT: How did you get in Vicky's or whoever's house?

THE DEFENDANT: Through the door, sir.

THE COURT: Through the door? Don't the facts show he cut the screen and went through the window?

MR. JAMES: Yes.

THE COURT: What did you cut through, the screen to the window? What did you do?

THE DEFENDANT: Just went in, sir.

(p. R-17)THE COURT: What did you do?

THE DEFENDANT: Had sex with her.

THE COURT: Had sex with her. All right. Where did you have sex with her?

THE DEFENDANT: (No response.)

THE COURT: On the bed or the sofa or the floor or what?

THE DEFENDANT: (No response.)

THE COURT: Where did you have sex with her? On the bed or floor or where?

THE DEFENDANT: (No response.)

THE COURT: You want to ask him?

MR. SMITH: Tell the judge.

THE DEFENDANT: In the bed.

THE COURT: All right. In the bed. How were you – okay. Did she invite you in the house to have sex with her?

THE DEFENDANT: No, sir.

THE COURT: All right. Did he have any weapon?

MR. JAMES: A knife.

THE COURT: Did you have any kind of weapon?

THE DEFENDANT: A knife.

THE COURT: Butcher knife, pocket knife, or what.

(p. R-18)THE DEFENDANT: Butcher knife.

THE COURT: Where did you get that from?

THE DEFENDANT: (No response.)

THE COURT: Where did you get it?

THE DEFENDANT: I already had it, sir.

THE COURT: Where did you get it from when you first had it?

THE DEFENDANT: Found it, sir.

THE COURT: Where did you find it?

THE DEFENDANT: Just found it, sir.

THE COURT: Where?

THE DEFENDANT: (No response.)

THE COURT: You don't remember where you find the knife?

MR. SMITH: That's in the statement. He found it.

THE COURT: I understand that. You don't remember where you found the knife?

THE DEFENDANT: Just found it, sir.

THE COURT: All right. Just found it. Okay. And who pulled the clothes off, you or she? Which one pulled her clothes off?

THE DEFENDANT: She had no clothes on, sir.

THE COURT: All right. And you had a knife. (p. R-19) What else do the facts show?

MR. JAMES: She did have on clothes. She had on panties and he pulled – he was dressed in a ski mask.

THE COURT: How were you dressed?

THE DEFENDANT: I had under clothes on, sir.

THE COURT: What else did you have on.

THE DEFENDANT: Clothes? I had no clothes, sir.

THE COURT: You didn't have any clothes on. Did you have on a ski mask?

THE DEFENDANT: No, sir.

THE COURT: You were naked too?

THE DEFENDANT: Yes, sir.

THE COURT: What month was this?

MR. JAMES: September.

THE COURT: You were running around naked at that time of the morning?

THE DEFENDANT: Yes.

THE COURT: You got in the house and she didn't – you do you recommend that I accept the plea?

MR. SMITH: Yes, sir.

THE COURT: The Court finds you understand your constitutional rights and enter your plea (p. R-20) voluntarily, intelligently, and knowingly in 85-1683 and I accept your plea. In 85-1684, burglary in the first degree, I accept your plea.

Mr. Smith, he is having a problem, and to prevent you from having a problem, I'm going to revoke the bond and do a pre-sentence report. He looks like he's trying to go out on you.

MR. SMITH: Let me take him to the probation officer.

THE COURT: I will tell Mrs. Flack he is upstairs, and we will work with him that way. All right. Once he settles down, we will put him on bond. January 17th, at 8:30.

(Whereupon, all proceedings were adjourned until the sentencing hearing on January 17th, 1986, at approximately 8:30 a.m.)

THE COURT: State of Alabama versus James L. Smith. All right. Who are all of these folks?

MR. SMITH: Family and friends and well wishers.

MR. JAMES: The victim and (p. R-21) representatives from our office and the light house.

THE COURT: Is the victim here? I don't see any reason for the other folks to be up here. The victim should be here. I want to hear what she has to say.

MR. JAMES: Tell the judge what your feelings are about this, as a result of this incident.

THE VICTIM: Well, I think he should be punished and I think he should be made to feel the way I was feeling which was with a whole lot of fear and as of right now just a whole lot of fear. Any my children's fear of being at home with me or being at home period.

THE COURT: Yeah.

THE VICTIM: Before this happened, we were very secure, you know. Like I said, we are all afraid. And we're afraid if he gets out, he will do it again. And possible just to bother and bring harm to --

THE DEFENDANT: No, I didn't say that.

THE COURT: Basically, that's what you said. You told me in a letter (p. R-22) you did it. He did it because of some of the pressure he had with his problems with you. (Pointing defendan't [sic] girlfriend.) That's what he is saying. And that's what you said in your letter. I have both of the letters. You wrote me. I have both of the letters. You wrote me and told me all about he suspected you of doing something. I believe you perhaps weren't, but he suspected that. That's why he did it,

because he was having pressure with you. You want to read his letter?

DEFENDANT'S GIRLFRIEND: Yes

THE COURT: I – you want to read it?

DEFENDANT'S GIRLFRIEND: Yes.

THE COURT: Okay. You go back there and sit down and read it. This is the one you wrote him. Right here. See, I have yours too. In that letter, you sort of understand why he did it because of the suspicions he had which, perhaps, were unfounded, but he, at least, had them. You go back and sit down there and read it.

(p. R-23)MR. SMITH: I'll be back. I need to call my office.

(Pause.)

THE COURT: Are you satisfied he did it now?

DEFENDANT'S GIRLFRIEND: (Nods head to indicate the affirmative.)

THE COURT: Do you have anything to say as to why the sentence of law -- have a seat, if you want to.

(Victim exits.)

THE COURT: Do you have anything to say as to why the sentence of law shouldn't now be imposed against you?

THE DEFENDANT: No, sir.

THE COURT: You have a lot of good letters. And you have been in the penitentiary once, but not holding that against you, I will just let you know that.

MR. JAMES: The State moves to invoke the Habitual Offender Act and provides the Court with one certified copy of a prior conviction and would state to the Court that this charge carries a mandatory twenty year penitentiary sentence.

(p. R-24) THE COURT: All right. Do y'all admit or deny?

MR. SMITH: I didn't know anything about it, but it looks like that paper is all right and in order.

THE COURT: Are you satisfied with it? You want to ask him now about it? He doesn't have to tell you whether he admits or denies whether he was convicted in Huntsville.

THE DEFENDANT: Yes, sir. Forgery and receiving and concealing. I didn't know at the time even what a misdemeanor or a felony was.

THE COURT: You can talk to him, if you want. The law says he doesn't have to admit anything to me.

MR. SMITH: Yes, sir. Like I say, I didn't know a thing, but the papers are in order and I will say that. And apparently if he is the same James L. Smith that was up in Huntsville – I assume you got convicted up there.

THE DEFENDANT: Yeah. It was buying and receiving and concealing.

MR. SMITH: All right. Okay.

THE COURT: The Court hereby grants the (p. R-25) State's motion to invoke the Habitual Offender Act. Well, you know, I can't solve all of your problems, Mr. Smith,

and I'm not going to stand here a long time and try to lecture you. The problems you caused that lady is very damaging. I will be honest with you. I will be honest with you, you have got a lot of good letters here and a lot of folks must think a lot of good things about you, but with the damage you caused her mentally and I guess physically too, but surely physically, it cannot be radicated with one stroke of the pen. That's real sad. You just have to know how to control your problems. And from reading your wife's letter and your letter, you may have been overreacting to what you suspected. I doubt it was happening, but I am not the person to live with it. Do you have anything to say as to why the sentence of law shouldn't be imposed against you?

MR. SMITH: After talking to everybody, (p. R-26) he needs to go to Bryce's and be mentally evaluated. I don't know if he was in his right mind at the time of the offense when it was committed, or at the time that he pled guilty up here, based on that letter.

THE COURT: You know he was in his right mind when he pled guilty.

MR. SMITH: I know he almost fainted and he perspirated and his eyes rolled back in his head and all of that.

THE COURT: I'm not saying he was faking, but if he wasn't in his right mind, he wouldn't have stood up here when he pled and then straighten up the way he did.

MR. JAMES: The State strongly objects to him being sent to Bryce's and asks the Court to sentence the man to the maximum amount.

THE COURT: What is that?

MR. JAMES: Life.

MR. SMITH: I think based on the letters and all, – I didn't know about a prior record and all – life in this case would be inappropriate.

(p. R-27) THE COURT: He –

MR. SMITH: That would be cruel and unusual punishment.

THE COURT: He has a lot of good letters. He overreacted to what he suspected his wife of doing. No way can I radicate that. I know the pain and mental problems he caused this woman, and without any more, I am going to sentence him to thirty years in the penitentiary.

MR. SMITH: I put the Court on notice of appeal and ask the sentence to be suspended pending the appeal.

THE COURT: I cannot do that. It's over twenty years.

MR. JAMES: Also, there's restitution in the amount of – that's in case 85-16 – the rape was 85-1683.

THE COURT: That's in 85-1683. Do you have anything to say as to why the sentence of law shouldn't be imposed against you in case number 85-1684?

THE DEFENDANT: (No response.)

THE COURT: What is the sentence in this case?

MR. JAMES: It carries a sentence from (p. R-28) twenty to life.

THE COURT: Do you have anything to say as to why the sentence of law shouldn't now be imposed against you in 85-1684?

THE DEFENDANT: (No response.)

THE COURT: I sentence you to thirty years in 85-1684 to run concurrently with the sentence imposed in 85-1683. What is restitution?

MR. JAMES: $191.61.

THE COURT: I am going to order restitution in the amount of $191.61. I am going to order that the Director or the Commissioner of the Board of Corrections for the State of Alabama, that if you receive any money during the time while in the penitentiary, that he order his staff to deduct the amount of $191.61 from that and that's to be paid to the Clerk's Office of Montgomery County towards restitution in that case.

The Court is going to the exempt you from paying attorney fees -- I mean court costs. And you are retained, aren't you?

(p. R-29) MR. SMITH: Yes, sir.

THE COURT: I am going to note oral notice of appeal.

MR. SMITH: Yes. Both cases.

THE COURT: I am appointing you on the case. All right.

(Whereupon, all proceedings were adjourned.)

* * *

(p. R-30) *CERTIFICATE OF COMPLETION*

State of Alabama)
Montgomery County)

I, Melody J. Perkins, Official Court Reporter for the Fifteenth Judicial Circuit, do hereby certify that the foregoing twenty-nine computer-printed pages contain a true and correct transcription of the matters as reported by me in the matter of State of Alabama vs. James L. Smith, CC-85-1683 and CC-85-1684, as occuring on January 6th and 17th, 1986.

I further certify that an original and three copies of said transcript have this date been filed with the Clerk of the Original Court.

All pages are numbered serially and centered at the bottom of each page, the last of which appears at the bottom of this certificate.

Dated this the 20th day of February, 1986.

/s/ Melody J. Perkins
Melody J. Perkins
Official Court Reporter

Pre-sentence Investigation Report

ALABAMA BOARD OF PARDONS AND PAROLES

REPORT OF INVESTIGATION

Type of Investigation Pre-Sentence

Date Dictated 1/13/86

Name Smith, James Lewis True Name Same
Alias: Smith, James; Smith, James L.
RSA BM-26 DOB: 03-31-59 Height and Weight 5'11" - 160 lbs.
Complexion Dark Color or Hair Black Color of Eyes Brown
Bodily Marks None
Driver's License # Unknown SS# 423-80-6110
AIS#___ FBI#___ SID# AL00454742
Address 5316 Loisa Lane Phone # 281-5302
Montgomery, AL 36108
County Montgomery Case # 85-1683/1684
Offense(s) Rape I; Burglary I
Sentence(s) 30 Yrs. Pen / 30 years penitentiary concurrent.
Date of Sentence 1-17-86 Date Sentence began 1-17-86
Date of Arrest 09-18-85; Date of Bond 09-24-85;
01-06-86 None
Bond Amt. $5000; 2500
Judge Charles Price D.A. James H. Evans
Attorney Elno Smith Retained X Appointed___
Court Ordered Restitution $ 191.61
Barred from Parole (Ala. Code 15-22-27.1) Yes__ No X
NOTES:

PRESENT OFFENSE

County, Court, & Case Number:

Montgomery Co., CC #85-1683.

Offense:

Rape I.

Sentence:

Thirty (30) years penitentiary.

Date of Sentence:

January 17, 1986.

Details of Offense:

Reports reflect that on September 14, 1985, at approximately 1:30 A.M., a black male broke into the residence of Vickie Hurst, 4925A Hatton Avenue, Montgomery, AL, while Vicki[e] Hurst and her three children were at home. The black male, with a small knife in his possession, found Vickie Hurst in her bedroom and forced her to ingage in sexual intercourse with him. Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex where she lived. On September 18, 1985, Montgomery Police Officers had Vickie Hurst listen to voices of five black males and at that time she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject admits having sex with the victim but states he did not force her.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, BF, dob: 07-13-58, SSN: 418-84-6272, 4925A Hatton Avenue, Montgomery, AL, ph. 281-8543.

Victim Impact:

The victim impact report has been sent to Vickie Hurst. Should it be returned it will be summarized.

Location of Offense:

The present offense occurred within the city limits of Montgomery, AL.

Court Ordered Restitution:

$191.61

PRESENT OFFENSE

County, Court, & Case Number:

Montgomery Co., CC #85-1684.

Offense:

Burglary I.

Sentence:

Thirty (30) years penitentiary concurrent.

Date of Sentence:

January 17, 1986.

Details of Offense:

Reports reflect that on September 14, 1985, at approximately 1:30 A.M., a black male broke into the residence of Vickie Hurst, 4925A Hatton Avenue, Montgomery, AL, while in possession of a small knife and while Vickie Hurst and her three children were at home. Entry into the residence was made by cutting the screen of a rear window.

Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex. On September 18, 1985, Montgomery Police Officers had Vickie Hurst listen to voices of five black males and at that time she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject admits breaking into the residence. He states he was having trouble with his girl friend and depressed.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, BF, dob: 07-13-58, SSN: 418-84-6272, 4925A Hatton Avenue, Montgomery, AL, ph. 281-8543.

Victim Impact:

The victim impact report has been sent to Vickie Hurst. Should it be returned it will be summarized.

Location of Offense:

The present offense occurred within the city limits of Montgomey, AL.

Court Ordered Restitution:

RECORD OF ARREST

Prior Arrest Record:

09-19-75	PD Huntsville, AL CC #75-1072F	BRCSP	3Y pen.

09-19-75	PD Huntsville, AL CC #75-10-741F	GL, BRCSP	Np on 04-19-76
09-18-85	PD Montgomery, AL CC#85-1682	Sodomy I	Np on 01-06-86

Subsequent Arrest Record:

None located.

PERSONAL/SOCIAL HISTORY

Subject:

James Lewis Smith, age 26, BM, dob: 03-31-59, was the third of four children born to Leola McCrary in Huntsville, AL. James' father and mother were not married and James was raised in Huntsville, AL, by his mother until he was sent to prison in 1976. After being released from prison, Smith relocated in Montgomery and has lived here since.

Marital Status/History:

Subject was married to Doris Pollard, age and whereabouts unknown from 1981 until they divorced in 1984. No children were born of this union. Subject has one child by Edna Ford. The child's name is Ranine Ford, age 8, and currently resides in Huntsville, AL, with her mother. Subject states he is under court order out of Madison County to pay child support of $100 per month.

Health:

Subject states in 1981 he was hurt on the job and since that time has had back problems. He denies ever having seen a psychiatrist or psychologist.

Smith admits to the use of marijuana and states he began at age eight and used it regularly until he was approximately 16 years old. He states in the last 10 years he has used marijuana occasionally and last smoked a joint several months ago. He also admits to trying acid, speed and diet pills 10 to 11 years ago. Subject admits to the use of alcoholic beverages and states he drinks on social occasions.

Education:

Smith completed the 9th grade at Huntsvill High School, Huntsville, AL, in 1974. He states he in 1978 he attended the Montgomery Area Skill Center and secured his GED.

Financial Status:

Smith owns a 1974 Mazda and at this time has the following debts: two Visa credit cards, approximately $1800 at $90 per month; Money Express, $300 at $11 per month and child support of $100 per month. At this time subject is incarcerated and has no income.

Employment History:

For the last two years, Smith [has] been self-employ[e]d doing janitorial service and selling items thorough [sic] catalogs. The name of his janitorial service is Electro Janitorial and Home Cleaning Service and the name of the catalog sales is Catalogs International. He states that between the two businesses he makes approximately $5000 to $6000 per year.

H & H Janitorial Service, from 1982 until he went into business for himself in 1983.

Baptist Medical Center in their housekeeping department from 1979 until he hurt his back in 1981.

From 1981 through 1982, subject states he received Workman's Compensation for the injury to his back at Baptist Medical Center.

Military Record:

None.

Offender's Family:

Father: Lewis Columbus Humphrey, age 50, lives in the Huntsville, AL, area.

Mother: Leola Smith McCrary, age 48, lives at 310D St. Clair Avenue, Huntsville, AL, and is unemployed. As stated previously, subject's father and mother were never married.

Siblings:

Betty Jo Fletcher, age 30, lives in Huntsville, AL, and works at Big Spring Manor Nursing Home.

Carrie Jean Smith, age 28, lives in Huntsville and works at Big Spring Manor Nursing Home.

Doris Ann Smith, age 15, lives with her mother at 310D St. Clair Avenue, Huntsville, AL, and attends school.

EVALUATION OF OFFENDER

Psychological Reports:

None.

Reputation & Community Attitude:

I have received numerous telephone calls from people who state that James Lewis Smith had done house work for them, worked in their house while they were alone with him and they were never afraid. Other character references state that they do not believe he is capable to committing such an offense. Please see the attached letters of character reference.

Parole & Probation Officer's Remarks:

None.

PROBATION PLAN

Home:

If granted probation, subject states he will live at 5316 Loisa Lane, Montgomery, AL.

Job:

If granted probation, subject states he will continue his self-employment.

Recommendation:

I would recommend that probation be denied and that subject be sentenced to 20 years in the penitentiary in each case concurrent.

Signed and dated at Montgomery, AL, this 14th day of January, 1986.

/s/ Carolyn P. Flack
Carolyn P. Flack
Alabama Probation &
Parole Officer

CPF/lcm

ALABAMA BOARD OF PARDONS AND PAROLES

REPORT OF INVESTIGATION

Type of Investigation PRE-SENTENCE

Date Dictated 8/19/86

Name SMITH, JAMES LEWIS True Name SAME
Alias: SMITH, James; SMITH, James L.
RSA BM-27 DOB: 03-31-59 Height and Weight 5'11" 160 lbs.
Complexion Dark Color or Hair Black Color of Eyes Brown
Bodily Marks None
Driver's License # Unknown SS# 423-80-6110
AIS# ___ FBI# 256 662 EA9 SID# 00454742
Address 5316 Loisa Lane Phone # 281-5302
Montgomery, Alabama 36108
County Montgomery Case # 85-1682/1683/1684

Offense(s) Sodomy I/Rape I/Burglary I
Sentence(s) _____
Date of Sentence _____ Date Sentence began _____
Date of Arrest 09-18-85/01-06-86 Date of Bond
09-24-85/None Bond Amt. $5,000/$2,500 (2 cs.)
Judge Charles Price D.A. James H. Evans
Attorney John Cason Retained ___ Appointed XX
Court Ordered Restitution $_____
Barred from Parole (Ala. Code 15-22-27.1) Yes ___ No XX

NOTES: On January 6, 1986, CC #85-1682 – Sodomy I was nolle prossed and at that time, subject pled guilty to CC #85-1683 -- Rape I; CC #85-1684 – Burglary I. On Januray 17, 1986, James Lewis Smith was sentenced to 30 years in the penitentiary concurrent, and at that time, an oral notice of appeal was given. On July 16, 1986, the Alabama Court of Criminal Appeals reversed and remanded. Then on August 19, 1986 in a jury trial, James Lewis Smith was found guilty of Sodomy I, Rape I and Burglary I.

PRESENT OFFENSE

County, Court and Case Number:

Montgomery County, Circuit Court, CC #85-1682

Offense:

Sodomy I

Sentence:

Date of Sentence:

Details of Offense:

Reports reflect that on September 14, 1985 at approximately 1:30 a.m., a black male broke into the residence of Vickie Hurst, 4925-A Hatton Avenue, Montgomery, Alabama while Vickie Hurst and her three children were at home. The black male, with a small knife in his possession, found Vickie Hurst in ber bedroom and forced her to engage in oral intercourse with him. Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex where she lived. On September 18, 1985, Montgomery police officers had Vickie Hurst listen to voices of five black males and at that time, she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject states he did not commit the offense.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, black female, dob: 07-13-58, SSN: 418-84-6272, 4925-A Hatton Avenue, Montgomery, Alabama, telephone number: 281-8543.

Victim Impact:

In January, 1986 the victim impact report was sent to Vickie Hurst and 4925-A Hatton Avenue, Montgomery,

Alabama and she returned it. According to Ms. Hurst, since the burglary, sodomy and rape occurred, she is afraid to go into her house at night or be in her house at night and she sleeps during the day so she can stay awake at night. She further states that since the rape and sodomy, she feels helpless and sits each night waiting for someone to break in on her.

Location of Offense:

The present offense occurred within the city limits of Montgomery, Alabama.

Court Ordered Restitution:

PRESENT OFFENSE

County, Court and Case Number:

Montgomery County, Circuit Court, CC #85-1683

Offense:

Rape I

Sentence:

Date of Sentence:

Details of Offense:

Reports reflect that on September 14, 1985 at approximately 1:30 a.m., a black male broke into the residence of Vickie Hurst, 4925-A Hatton Avenue, Montgomery, Alabama while Vickie Hurst and her three children were at home. The black male, with a small knife in his possession, found Vickie Hurst in her bedroom and forced her

to engage in sexual intercourse with him. Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex where she lived. On September 18, 1985, Montgomery police officers had Vickie Hurst listen to voices of five black males and at that time, she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject states he did not commit the offense.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, black female, dob: 07-13-58, SSN: 418-84-6272, 4925-A Hatton Avenue, Montgomery, Alabama, telephone number: 281-8543.

Victim Impact:

The victim impact report was sent to Vickie Hurst, 4925-A Hatton Avenue, Montgomery in Janurary, 1986 and Ms. Hurst returned it. According to Ms. Hurst, that since the burglary, sodomy and rape occurred, she is afraid to go into her house at night or be in her house at night and she sleeps during the day so she can stay awake at night. She further states that since the sodomy and rape, she feels helpless and sits each night waiting for someone to break in on her.

Location of Offense:

The present offense occurred within the city limits of Montgomery, Alabama.

Court Ordered Restitution:

PRESENT OFFENSE

County, Court and Case Number:

Montgomery County, Circuit Court, CC #85-1684

Offense:

Burglary I

Sentence:

Date of Sentence:

Details of Offense:

Reports reflect that on September 14, 1985 at approximately 1:30 a.m., a black male broke into the residence of Vickie Hurst, 4925-A Hatton Avenue, Montgomery, Alabama, while Vickie Hurst and her three children were at home. During the burglary, the black male had a small knife in his possession. Entry into the residence had been made by cutting the screen of a rear window.

Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex. On September 18, 1985, Montgomery police officers had Vickie Hurst listen to voices of five black males and at that time, she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

N/A.

Subject's Statement:

Subject states he did not commit the offense.

Case Statuts of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, black female, dob: 07-13-58, SSN: 418-84-6272, 4925-A Hatton Avenue, Montgomery, Alabama, telephone number: 281-8543.

Victim Impact:

The victim impact report was sent to Vickie Hurst, 4925-A Hatton Avenue, Montgomery in January, 1986 and Ms. Hurst returned the report. According to Ms. Hurst, that since the burglary, sodomy and rape occurred, she is afraid to go into her house at night or be in her house at night and she sleeps during the day so she can stay awake at night. She further states that since the rape and sodomy, she feels helpless and sits each night waiting for someone to break in on her.

Location of Offense:

The present offense occurred within the city limits of Montgomery, Alabama.

Court Ordered Restitution:

RECORD OF ARREST

Prior Arrest Record:

09-19-75	PD Huntsville, Al CC #75-1072-F	Buying, Receiving, & Concealing Stolen Property	3 Years Pen.
09-19-75	PD Huntsville, AL CC #75-10-741-F	Grand Larceny/ B.R.C.S.P.	Nolle Prossed on 04-19-76

Subsequent Arrest Record:

None located.

PERSONAL/SOCIAL HISTORY

Subject:

James Lewis Smith, age 27, BM, dob: 03-31-59, was the third of four children born to Leola McCrary in Huntsville, Alabama. James' father and mother were not married and James was raised in Huntsville, Alabama by his mother until he was sent to prison in 1976. After being released from prison, Smith relocated in Montgomery and has lived here since.

Marital Status/History:

Subject was married to Doris Pollard, age and whereabouts unknown from 1981 until they divorced in 1984. No children were born of this union. Subject has one child by Edna Ford. The child's name is Ranine Ford, age 8, and currently resides in Huntsville, Alabama with her mother. Subject states he is under court order out of Madison County to pay child support of $100 per month.

Health:

Subject states in 1981 he was hurt on the job and since that time, has had back problems. He denies ever having seen a psychiatrist or psychologist.

Smith admits to the use of marijuana and states he began at age eight and used it regularly until he was approximately 16 years old. He states in the last 10 years he has used marijuana occasionally and last smoked a joint several months ago. He also admits to trying acid, speed and diet pills 10 to 11 years ago. Subject admits to the use of alcoholic beverages and states he drinks on social occasions.

Education:

Smith completed the 9th grade at Huntsville High School, Huntsville, Alabama in 1974. He states in 1978 he attended the Montgomery Area Skills Center and secured his G.E.D.

Financial Status:

Smith owns a 1974 Mazda and at this time, has the following debts: two Visa credit cards, approximately $1800 at $90 per month; Money Express, $300 at $11 per month and child support of $100 per month. At this time, subject is incarcerated and has no income.

Employment History:

For approximately the last two years, Smith has been self-employed doing janitorial service and selling items

through catalogs. The name of his janitorial service is Electro Janitorial and Home Cleaning Service and the name of the catalog sales is Catalogs International. He states that between the two businesses, he makes approximately $5,000 to $6,000 per year.

H. & H. Janitorial Service, from 1982 until he went into business for himself in 1983.

Baptist Medical Center in their housekeeping department from 1979 unitl he hurt his back in 1981.

From 1981 through 1982, subject states he received Workman's Compensation for the injury to his back at Baptist Medical Center.

Military Record:

None.

Offender's Family:

Father: Lewis Columbus Humphrey, age 50, lives in the Huntsville, Alabama area.

Mother: Leola Smith McCrary, age 48, lives at 310-D St. Clair Avenue, Huntsville, Alabama and is unemployed. As stated previously, subject's father and mother were never married.

Siblings: Betty Jo Fletcher, age 30, lives in Huntsville, Alabama and works at Big Spring Manor Nursing Home.

Carrie Jean Smith, age 28, lives in Huntsville and works at Big Spring Manor Nursing Home.

Doris Ann Smith, age 15, lives with her mother at 310-D St. Clair- Avenue, Huntsville, Alabama and attends school.

EVALUATION OF OFFENDER

Psychological Reports:

None.

Reputation & Community Attitude:

I have received numerous telephone calls from people who state that James Lewis Smith had done house work for them, worked in their house while they were alone with him and they were never afraid. Other character references state that they do not believe he is capable of committing such an offense.

Parole & Probation Officer's Remarks:

None.

PROBATION PLAN

Home: If granted probation, subject states he will live at 5316 Loisa Lane, Montgomery Alabama.

Job: If granted probation, subject states he will continue his self-employment.

Recommendation:

I would recommend that probation be denied and that subject be sentenced to 25 years in the penitentiary in each case, concurrent.

Signed and dated at Montgomery, Alabama this the 20th day of August, 1986.

/s/ Carolyn P. Flack
Carolyn P. Flack
Alabama Probation &
Parole Officer

CPF:paf

Supplemental Record on Motion to Withdraw Guilty Plea

SUPPLEMENTAL RECORD

JAMES LEWIS SMITH

APPELLANT

VS

STATE OF ALABAMA

APPELLEE

CASE NUMBER CC-85-1683 & CC-85-1684-PR

ON APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY

HONORABLE ELNO A. SMITH, JR., 25 WASHINGTON AVENUE, MONTGOMERY, ALABAMA
ATTORNEY FOR APPELLANT

ATTORNEY GENERAL, STATE OF ALABAMA, MONTGOMERY, ALABAMA
ATTORNEY FOR APPELLEE

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CLERK'S CERTIFICATE

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(p. R-1) IN THE FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
PLAINTIFF,	)	CC-85-1683-PR
VS.	)	
JAMES L. SMITH,	)	
DEFENDANT.	)	

SUPPLEMENTAL TRANSCRIPT

(MOTION FOR NEW TRIAL/ MOTION
TO WITHDRAW PLEA)

* * * * * * * * *

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(p. R-2) IN THE FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
PLAINTIFF,	)	CC-85-1683-PR
VS.	)	
JAMES SMITH,	)	
DEFENDANT.	)	

* * * * * *

Whereupon, the following proceedings occurred on March 17, 1985, at approximately 9:30 A.M. before the Honorable Charles Price, Circuit Court Judge, Fifteenth Judicial Circuit.

* * * * * *

APPEARANCES

FOR THE STATE OF ALABAMA:
Mr. Randall James, Esq.
Deputy District Attorney
District Attorney's Office
142 Washington Avenue
Montgomery, AL 36103

FOR THE DEFENDANT JAMES SMITH:
Mr. Elno Smith, Esq.
Smith, Cruse & Law
P.O. Drawer 789

(p. R-3) (Motion to withdraw plea/motion for a new trial.)

THE COURT: State of Alabama versus James Smith, 85-1684. He entered a plea of guilty in 85-1684 to rape and burglary and the Court sentenced him to thirty years in the penitentiary. Mr. Smith is here this morning on a motion to withdraw the guilty plea and a motion for a new trial. We will take the motion for new trial first, Mr. Smith.

MR. SMITH: All right, sir. Mr. Smith, if you will take the stand up there, please.

Your Honor, I believe we can hear these together.

THE COURT: That's fine. You want to combine them?

MR. SMITH: Yes, sir.

THE COURT: All of the evidence is going to be the same?

MR. SMITH: Yes, sir.

JAMES L. SMITH

Having been sworn, testified as follows:

DIRECT EXAMINATION

(By Mr. Smith:)

Q. State your name to the Court, please.

(p. R-4) A. James L. Smith.

Q. And Mr. Smith, you heard the Judge tell you what you were charged with.

A. Yes, sir.

Q. He also told you what your sentence was.

Now, do you recall when you were here on July 6th, 1986, when you entered a guilty plea what was your mental condition at that time?

A. I – I – I couldn't even say, sir. All I know is that I was – I couldn't see nothing. I couldn't hear anything. I didn't know – that's all I know. From what you told him on the day of sentencing, that I perspired, my eyes rolled in the back of my head, and I fainted. From what you said on the day, the 17th of January, that's all – I didn't know anything – I – like I said, I didn't know what had happened. All I knew – I didn't know what was going on. I didn't hear any questions; I didn't answer any questions. I didn't know what was happening, sir. That's all I know. From what you said on January the 17th, when you said I perspired and my eyes watered in the back of my head, and your Honor asked you if you – if you thought I was not capable of giving such a statement, why didn't you stop it? And I didn't know – I didn't hear your reply. I know of your Honor – I've seen the transcript. And, you know, and I didn't see a lot of things that was on the (p. R-5) transcript, I didn't see it happen. I didn't know what was happening. I say, well, I didn't – I never heard of any or none of this. I said, I didn't answer these questions. It seems like everybody was answering questions for me there. I didn't know – I was never asked. And I seen on the transcript where your Honor, he would say things like, you know, he was tired of this, and he'd say things like, you know, what's wrong with him? You know, I don't know. You know, I didn't know what was going on.

I didn't know whether I was there or whether I was not there. I didn't know the situation or what was going on at all.

Q. All right. Let me ask you this: are you guilty of this crime?

A. No, sir.

Q. You don't feel that you're guilty?

A. No, sir.

Q. And you don't have any recollection –

A. No, sir.

Q. – of what transpired –

A. No more –

Q. – on the 17th?

A. No more than what I read on the transcript, sir.

Q. And where did you get the transcript from?

A. My friend, she's the one that came down and got a copy, and she mailed me a copy.

Q. So you do have a copy of the transcript as (p. R-6) prepared in this case?

A. Yes, sir. I did have an opportunity to get a copy.

Q. You did have an opportunity to read it?

A. Yes. And like I said, the things that went on, I didn't – I wasn't aware of it. I, you know, uh – I noticed on the transcript you all answered a lot of questions that were asked me, but I never gave a response. And I know

the transcript said I would sway and that I would be, you know, that I couldn't hold myself up, which I was not even aware of. I only know this from the transcript itself.

Q. So if you read the transcript, you saw where I asked the Judge to have you sent to Bryce's to be evaluated, mentally evaluated, did you not?

A. Sir?

Q. You read now where I asked the Judge to send you to Bryce Hospital to have you examined?

A. I didn't understand the reasons why you were saying it, no more than I fainted and my eyes rolled back in my head, and you see, I couldn't have known what was going on. I couldn't have made the plea voluntarily or – supposedly, the crime I was supposed to have committed, if I did do it, I couldn't have been in my right mind when I done it. It didn't seem to me like anything was evidently concrete on the matter, but then too, I didn't understand anything that (p. R-7) was going on in the first place.

Q. And you are not guilty of this crime?

A. No, sir.

MR. SMITH: That's all I have, your Honor. Mr. James may want to ask you some questions.

CROSS EXAMINATION

(By Mr. James:)

Q. Do you have any problems today, Mr. Smith?

A. Well, I – I couldn't say, sir. I wouldn't know within myself.

Q. Well, Do you understand the questions I'm asking you?

A. Yes, sir, I understand.

Q. You don't recall Judge Price asking you questions under oath as to what took place on that day or on that night when you broke into that girl's house.

A. No, sir.

Q. And you are saying to Judge Price and the Court under oath that you didn't do this to this girl?

A. Yes, sir.

Q. All right. Did you write a letter to Judge Price?

A. My letter stated no such thing, sir. I never said – I said on the letter plainly that I'm not a rapist, I'm not a murder, I'm not a trouble maker, I am not – I told Judge Price to look my life over and see what kind of person (p. R-8) that I was because I wasn't that kind of person.

Q. Didn't you admit to your girlfriend that you had done it and that you were sorry?

A. No. No, sir, I never did. That – that wasn't said on that letter. I said no such thing on that letter.

Q. And you don't know what was wrong with you on that day?

A. What did you say, sir? I don't understand.

Q. You don't know what was wrong with you on that day?

A. Sir, all I know is what my attorney said on January 17th, that my eyes rolled back in the back of my head, and I perspired, and I fainted. And from the deputy – from the transcript, I saw something where the deputy asked what was wrong with me, and your Honor said there was nothing with me. He said I had to hold myself up. And from that time, I remember nothing. I noticed the transcript constantly said I swayed. And the Court would ask me questions four and five times with no response.

Q. You don't recall talking to your girlfriend prior to that plea and debating on whether to plea or to go to trial on the thing?

A. Sir, I – I – I am sure in the process of all of that, what was going on, I was so – whew, I don't know. I – I couldn't – I don't even have the words for it, to tell you the truth. (p. R-9) All I know is when this was taking place, I seen a place –

THE COURT: Hold on. All right. Go ahead.

A. I seen a place within the transcript where it said that I was told to raise my hand to swear in, but I – I don't remember swearing in to anything. And I noticed that the transcript says that something about if anything is wrong with him, how did he recover? And then right after that, my lawyer tells me to put my hand down. But I didn't – evidently, you know, I didn't even know I had my hand up, if I did have it up. I didn't – I didn't know what – I didn't know of anything that was taking place. For what reason, I can't even tell. All I know is what my lawyer said. When your Honor asked if there was any reason why my sentence shouldn't be invoked, that's

when he says because my eyes watered back in the back of my head, I perspired, and I fainted. I didn't know – I wasn't even present, as far I was concerned, because I didn't know of anything that was going on.

Q. Where were you, Mr. Smith, on September 14th, 1985, at 1:30 A.M.?

A. I – I don't know, sir. I couldn't recollect those days. I have no – no way of recounting for that day.

(p. R-10) Q. And how would you know about all of the things about going inside with no clothes on and going in with a knife, and the victim in this case, Vicky Hearst? How would you know all of those things if you were out of your mind?

A. I – I – I don't even remember saying any such things, sir.

MR. JAMES: I don't have any further questions.

MR. SMITH: That's all, your Honor.

THE COURT: Well, first of all, just a couple of observations from the bench. It's the Court's opinion at that time and it's still the Court's opinion that there was nothing wrong with you when you entered this plea.

(Defendant mumbling.)

THE COURT: First of all, you went in with Mr. Smith and you went over the Exhibit A and you signed that, you came out here and what you wanted to do was to engage in some more plea bargaining as to the particular sentence. And because you perhaps didn't get the particular sentence you wanted, that's what your concern is at this particular time.

(p. R-11) (Defendant mumbling.)

THE COURT: Now, when you stood right before me here and I asked you every question -- and you answered the questions. Nobody put in your mouth the testimony of what actually happened that night.

(Defendant mumbling.)

THE COURT: And as I recall, you stated to the Court that you went into the victim's home with no clothes on, with a knife, and you don't know where you got the knife from or you found the knife, et cetera, et cetera, et cetera. That, in addition to other testimony, corroborated with what the victim said had happened.

(Defendant mumbling.)

THE COURT: Now, first of all, you didn't faint. You perspired, and I guess, if I was or anybody was facing a rape charge, I would perspire just like anybody else.

(Defendant mumbling.)

THE COURT: There was some swaying that in the Court's opinion was exaggerated and faked. And the Court finds that there is (p. R-12) absolutely no reason to allow the defendant to withdraw any plea. And the defendant's plea was made knowingly, voluntarily, and intelligently. It followed everything the law requires. He was of sound mind, conscious of what he was doing, and there is no need to delay this case and/or anything else. The defendant knew what he was doing when he entered the plea. And he testified based on – substantially to what the victim said happened.

(Defendant mumbling.)

THE COURT: So, there is no need to allow the defendant to withdraw any plea. The plea was voluntarily and intelligently made, and made according to the

law. The Court is always cognizant of defendants when they make their plea. In fact, I would not accept a plea from someone that in my opinion is not cognizant of what he was saying or what he was doing, or if in any way the plea in my opinion was coerced, or the (p. R-13) defendant was misled or anything of that nature.

(Defendant mumbling.)

THE COURT: In addition to that, which is not part of my ruling here, I have received several letters, or at least two or three from the defendant. And all of them bear out and substantiate or corroborate his guilt in this particular case. Although that's not the point here, the point here is whether or not he should withdraw – the Court should allow him to withdraw his plea. I would only allow him to withdraw his plea if I found that the plea was not voluntarily made, intelligently made, or he was unaware of what was going on, or for some infirmary or illness, that he could not have entered into the plea voluntarily or intelligently, or if in any way that his lawyer or anyone misled him.

(Defendant mumbling.)

THE COURT: I found that Mr. Smith did exactly what any other criminal (p. R-14) lawyer would have done. He tried to do the best for his client that he could do, and that's all that has happened.

The defendant has to serve thirty years for rape and for breaking into this lady's house, and that's just that.

So, I deny your motion for new trial. And I deny your motion to withdraw your plea.

(Defendant mumbling.)

MR. SMITH: Thank you, your Honor.

THE COURT: All right.

(Whereupon, all proceedings were adjourned.)

(p. R-15) CERTIFICATION OF COMPLETION OF REPORTER'S TRANSCRIPT

STATE OF ALABAMA,	*	
	*	
Plaintiff,	*	CRIMINAL ACTION
	*	
VS.	*	CASE NUMBER
	*	85-1683
JAMES L. SMITH,		
Defendant.		

* * * * * * * * * * *

TO THE CLERK OF THE COURT OF CRIMINAL APPEALS:

I certify that I have this date completed and filed with the Clerk of the Trial Court, the original and three copies of a true and correct transcript of the evidence and matters designated by the parties.

I certify that a copy of this certificate has this date been served on the Clerk of the Appellate Court and Counsel for each of the parties.

DATED this 25th day of March, 1986.

/s/ Melody J. Perkins
MELODY J. PERKINS
Official Court Reporter

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	*	
PLAINTIFF,	*	CASE NO.:
VS.	*	CC-85-1683-PR
JAMES LEWIS SMITH,	*	CC-85-1684-PR
DEFENDANT.		

MOTION TO SUPPLEMENT AND MODIFY THE RECORD

(Filed March 21, 1986)

Comes now James Lewis Smith, and moves this Honorable Court pursuant to Rule 10(f) of the Alabama Rules of Appellate procedure to disclose what truly occurred in the Trial Court on the grounds that a material Hearing and Exhibit has been omitted from the Record.

In support of said Motion, Appellant would show unto the Court that the following events occured which are not reflected in the Record and which are omitted from the Record on Appeal filed by the Circuit Clerk of Montgomery County, Alabama:

1. On Wednesday, March 17, 1986, a hearing was held on a Motion for New Trial and Motion to Withdraw Guilty Plea.

2. At that hearing, which was denied, the Defendant appellant testified under oath as to his coercion, duress and involuntariness regarding the guilty plea in this case.

3. That the issue at this hearing is the issue this appellant wants to raise in the Court of Criminal Appeals.

4. That the transcript of this hearing has been omitted from this Record on Appeal.

WHEREFORE, THE PREMISES CONSIDERED, Appellant moves this Court to supplement and modify the Record in this case to disclose what truly occurred in the Trial Court.

Respectfully submitted,

/s/ Elno A Smith, Jr
ELNO A SMITH, JR.
ATTORNEY FOR APPELANT
SMITH, CRUSE & LAW
25 Washington Av.
Montgomery, Al. 36104

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above Motion for Modification of Record upon the Honorable James H. Evans, District Attorney for the Fifteenth Judicial Circuit of the State of Alabama, by handing him a copy of same this the 21 day of March, 1986.

/s/ Elno A Smith, Jr
ELNO A SMITH, JR.
ATTORNEY FOR APPELLANT

IN AND FOR THE FIFTEENTH JUDICIAL CIRCUIT
— MONTGOMERY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	CC-85-1683-PR
VS.	)	CC-85-1684-PR
	)	
JAMES LEWIS SMITH,	)	
Defendant.		

****

ORDER

Comes now this Honorable Court and states as follows:

1) That on the 20th day of February, 1986, proceedings in transcript form were filed in regards to the guilty plea and sentencing as occurring in the above-styled cause by the court reporter.

2) That on the 28th day of February, 1986, the trial transcript and the clerk's record were combined and filed with the Court of Criminal Appeals by the Clerk of the original court.

3) That on the 17th day of March, 1986, a hearing was held on a motion for a new trial and motion to withdraw guilty plea.

It is hereby ORDERED that the motion to supplement and modify the record is hereby GRANTED to include the March 17, 1986 hearing.

Done this the 25th day of March, 1986.

/s/ Charles Price
Charles Price
Circuit Court Judge

CLERK'S CERTIFICATE

JAMES LEWIS SMITH,	)	
	)	
APPELLANT,	)	
	)	CASE NUMBERS
VS.	)	CC-85-1683 & 1684-PR
	)	
STATE OF ALABAMA,	)	
APPELLEE.		

I hereby certify that the foregoing pages are a true and correct copy of the Petition to Supplement the Record the Order of Court granting Petition and the Court Reporter's supplement transcript.

I further certify that the original transcript of record on appeal was filed with the Court of Criminal Appeals on the 28th day of February, 1986, and this supplemental transcript is to be considered in connection with same.

DATED this the 31st day of March, 1986.

/s/ Debra P. Hackett
DEBRA P. HACKETT
Circuit Clerk
Montgomery County

Court of Criminal Appeals Opinion Reversing Respondent's Guilty Plea

James Lewis SMITH,

v.

STATE.

3 Div. 414.

Court of Criminal Appeals of Alabama.

July 15, 1986.

John C. Cason, Montgomery, for appellant.

Charles A. Graddick, Atty. Gen. and Victor Jackson, Asst. Atty. Gen., for appellee.

BOWEN, Presiding Judge.

James L. Smith pled guilty to first degree rape and first degree burglary. Sentence was thirty years' imprisonment in each case, the sentences to run concurrently.

Since a defendant waives several constitutional rights by pleading guilty, due process requires that the plea be a voluntary, knowing, and intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). "Subsequent to *Boykin [v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)], it has become established that the defendant must be informed of maximum and minimum possible sentences as an absolute constitutional prerequisite to acceptance of a guilty plea." *Carter v. State*, 291 Ala. 83, 85, 277 So.2d 896 (1973). If the defendant has prior felony

convictions, he must be advised of the proper sentence to which he was subject under the Habitual Felony Offender Act. *Abbott v. State*, 459 So.2d 995, 996 (Ala.Cr.App.1984); *Miliner v. State*, 414 So.2d 133, 134-35 (Ala.Cr.App.1981). See also *Thompson v. State*, 441 So.2d 1058, 1059 (Ala.Cr.App.1983); *Hall v. State*, 418 So.2d 946, 948 (Ala.Cr.App.1982); *Alston v. State*, 414 So.2d 488-89 (Ala.Cr.App.1982); *McGhee v. State*, 412 So.2d 327, 328 (Ala.Cr.App.1982). "The reason a defendant must be advised of the maximum sentence he could receive in pleading guilty is so that his plea will represent a knowing and intelligent choice among known alternatives." *Chapman v. State*, 412 So.2d 1276, 1277 (Ala.Cr.App.1982).

The record reveals that Smith was never informed of the proper sentences he could receive. Smith was separately indicted for first degree rape and first degree burglary. On January 6, 1986, Smith signed an "explanation of rights and plea of guilt" form, which stated in pertinent part:

> "Under the indictment returned against you in this case by the Grand Jury of this county, you are charged with the crime of *Burglary 1st and Rape 1st* which is a Class *A* felony. In the event you plead guilty to said crime, . . . the law provides for punishment in the penitentiary for not less than *15* nor more than *life* for such offense. . . . Provided further that at a sentencing hearing should the State of Alabama prove to this Court that prior to committing this offense, you have previously been convicted of any one (1) felony, then the said imprisonment term must be for not less than *N/A* nor more than ___, . . . "

This form did not inform Smith that he would receive two separate sentences or that he would be sentenced as a habitual felony offender. Additionally, the form did not

state the correct potential sentence for the first time conviction of a Class A felony which is "for life or not more than 99 years or less than 10 years." Alabama Code 1975, § 13A-5-6.

On January 6, 1986, before accepting Smith's guilty pleas, the circuit court judge advised him that the potential sentence for rape in the first degree was "ten years up to life in the penitentiary" and that the potential sentence for burglary in the first degree was "ten years up to life." the judge also informed Smith, "If you have any prior felony or felonies, of course, and the State moves the Court to invoke the Habitual Offender Act and proves you have a prior felony or felonies, your sentence *can* be increased proportionately, based upon the classification of the prior felony or felonies." (Emphasis added.) This instruction does not satisfy the constitutional requirement that the accused be informed of the minimum and maximum potential sentence and is misleading in that it affords the impression that the application of the Habitual Felony Offender Act is discretionary. Before the guilty pleas were accepted, Smith did not acknowledge any prior conviction and the prosecutor made no indication that any existed.

On January 17, 1986, the sentencing hearing was held, at which time the following occurred:

> "THE COURT: You [Smith] have a lot of good letters. *And you have been in the penitentiary once, but not holding that against you,* I will just let you know that.
>
> "MR. JAMES [Assistant District Attorney]: The State moves to invoke the Habitual Offender Act and provides the Court with one certified copy of a prior conviction and would state to the Court that this charge carries a mandatory twenty year penitentiary sentence." (Emphasis added.)

The judge granted the State's motion and the prosecutor requested that Smith be given a life sentence. Defense counsel opposed this recommendation and stated that he "didn't know about a prior record." The judge stated that he was going to impose a thirty-year sentence and asked the prosecutor, "What is the sentence in this case?" The prosecutor replied, "It carries a sentence from twenty to life." The judge then sentenced Smith: "I sentence you to thirty years in 85-1684 [burglary] to run concurrently with the sentence imposed in 85-1683 [rape]."

It is somewhat difficult to comprehend the logic of the appellate argument of the Assistant District Attorney (who has filed a memorandum brief in this Court) that Smith's plea was knowingly and intelligently entered when that very same prosecutor misstated the potential range of sentences in the circuit court. Alabama Code 1975, § 13A-5-9, provides that upon conviction for a Class A felony, the punishment for an offender with one prior felony conviction is "imprisonment for life or for any term of not more than 99 years but not less than 15 years."

The confusion in the circuit court is evidenced by the State's positions on appeal. The Attorney General, apparently under the belief that Smith had two prior convictions, initially responded to the appellant's brief by declining to file a brief and requesting that the cause be remanded "for proceeding in accord" with *Miliner*, supra, and other cases. Subsequently, the Attorney General requested to be permitted to withdraw this response on the ground that "[i]t appears from the record that the defendant may have had two prior felony convictions, thus making the minimum and maximum sentences as given by the trial court incorrect. However, appellee now knows that the defendant has only one prior felony."

The Attorney General's new knowledge is gained from the "memorandum brief" filed in this Court by the Assistant District Attorney. The "exhibits" attached to this brief, including the judgment entries of the Circuit Court of Madison County, have not been made a part of the record on appeal and are not properly before this Court. *Tyus v. State*, 347 So.2d 1377, 1379-80 (Ala.Cr.App.), cert. denied, *Ex parte Tyus*, 347 So.2d 1384 (Ala.1977).

Before the circuit judge accepted Smith's guilty pleas, he only informed him of the minimum and maximum sentences for a first-time felony offender. Therefore, whether Smith was actually sentenced as a felony offender with one or two prior convictions is insignificant, for, in either event, Smith was not advised of the correct potential sentence *before* he pled guilty.

"It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Boykin*, 395 U.S. at 242, 89 S.Ct. at 1711. Under these circumstances, this Court has no alternative but to reverse the judgment of the circuit court and remand this cause for further proceedings.

REVERSED AND REMANDED.

All Judges concur.

Motion to Recuse Trial Judge on Retrial

Tr. PP 431-432

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA	•	
	•	CASE NOS.
VS.	•	CC-85-1682-PR
	•	85-1683-PR
JAMES LEWIS SMITH	•	85-1684-PR
	•	

MOTION TO RECUSE

(Filed August 4, 1986)

By this motion the Defendant, James Lewis Smith, moves that the Honorable Charles Price, Judge of the Circuit Court of Montgomery County, Alabama, recuse himself, shows the following:

1. The Honorable Charles Price has prior to this date taken a guilty plea from said defendant and heard substative facts from the said defendant that would inflame and prejudice his ruling in a new trial.

2. The Honorable Charles Price has been in ex parte communications with the defendant prior to his former guilty plea, and said ex parte communications inferred a presumption of guilt by the defendant to the Honorable Charles Price and as such, would highly prejudice objective rulings by the trial judge in said case.

3. The defendant feels that should the Honorable Charles Price fail to disqualify himself, his impartiality might be open to question under the guidelines promulgated both by the American Bar Association and the Supreme Court of Alabama. Under those guidelines, judges should disqualify themselves not only when their

impartiality is in question, but they should disqualify themselves in order to avoid the very appearance of impropriety.

4. It is important to the integrity of the criminal justice system that the public's confidence in the impartiality of its judiciary not be eroded by the appearance of bias.

WHEREFORE, it is respectfully prayed that the Honorable Judge Charles Price recuse himself, or in the alternative, that an evidentiary hearing be held to divulge the facts herein and that said Judge then recuse himself.

Respectfully submitted,

/s/ John C. Cason
JOHN C. CASON
Attorney for the
Defendant

OF COUNSEL:

PERRY O. HOOPER, SR.
503 South Court Street
Suite 320
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Recuse upon the Honorable Terry Travis, Assistant District Attorney, Montgomery County, Alabama by hand delivery on this the 4th day of August, 1986.

/s/ John C. Cason
OF COUNSEL

Supplemental Motion to Recuse

Tr. PP 484, 485

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA	*	
Plaintiff,	*	CASE NOS.
VS.	*	CC-85-1682-PR
JAMES LEWIS SMITH	*	85-1682-PR
Defendant.	*	85-1683-PR

SUPPLEMENTAL MOTION IN SUPPORT OF TRIAL JUDGE TO DISQUALIFY HIMSELF

(Filed August 12, 1986)

COMES NOW the Defendant James Lewis Smith by and through his attorneys of record and respectfully moves this Court, the Honorable Charles Price, to voluntarily disqualify himself from sitting on the trial of this case. In support of his motion the Defendant states as follows:

1. That on or about January 1, 1986, the above trial Judge accepted a plea of guilty on behalf of the Defendant for one count of rape and one court of burglary.

2. Pursuant to this plea of guilty said trial Judge sentenced Defendant to thirty (30) years concurring in the penitentiary of the State of Alabama.

3. The Defendant, after imprisonment, of course bonded with said trial Judge by the United States Mail requesting a reversal on the guilty plea and a demand for a trial.

4. Defendant is now before the same Judge charged with the same indictments heretofore brought in this

Court, and it is Defendant's fear that the Court, having expressed himself as aforesaid after a reconsideration of the previous sentence, will not, if required by a verdict of plea, impose an unbiased, non-prejudiced sentence based on facts and circumstances herein charged.

Accordingly, the Defendant respectfully requests that the Court run an Order of Disqualification disqualifying himself and to transfer this case to another judge for trial.

Respectfully submitted,

/s/ John C. Cason
JOHN C. CASON
Attorney for the
Defendant

OF COUNSEL:

PERRY O. HOOPER, SR.
503 South Court Street
Suite 320
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Honorable Terry Travis, Deputy District Attorney, Montgomery County, Montgomery, Alabama by placing same in the United States Mail postage prepaid this the 12th day of August, 1986.

/s/ John C. Cason
OF COUNSEL

Hearing on Motion To Recuse

(p. R-6) RECORD ON THE RECUSAL –

THE COURT: Just a moment. The first motion the court will take up is the motion to recuse. All right. Make you argument.

MR. CASON: Your Honor, our client, based on the fact that he gave a prior guilty plea and conferred with the court as to the substantive issues evolving around this particular case, the defendant has asked that the trial judge recuse himself from the case based on that former guilty plea and sentencing, and, also, based on the fact that he claims he did have ex-parte with the trial judge by sending letters through the United States mail to the trial judge.

THE COURT: That's not ex-parte, because I get mail from people all the time –

MR. CASON: Yes, sir.

THE COURT: – from inmates; those that are charged, those that are not. I don't share those with anyone and really don't take much action on them.

MR. CASON: Yes, sir.

(p. R-7) THE COURT: If that is the ground for the motion, the motion is hereby denied. The guilty plea was overturned by the Court of Appeals. I don't take any position on it one way or another. It's a trial by jury. The jury will decide the guilt or innocence of the defendant in this case. That motion is denied.

MR. CASON: Your Honor, we had another broad motion that would go along with that –

THE COURT: Is that the supplemental motion?

MR. CASON: Yes, sir. The supplemental motion and we filed another motion requesting that on certain issues, namely trial judge recusing himself, and motions in limine, suppression hearing, so forth, that if they were not in favor of the defendant, that the court – we have asked the court to stay the proceedings to certify these issues to the Court of Criminal Appeals.

THE COURT: I will get to that particular motion.

MR. CASON: All right, sir.

THE COURT: I will deal with each motion as (p. R-8) they come up.

MR. CASON: All right, sir.

THE COURT: Motion for the individual voir dire and sequestration of jurors during voir dire. All right. State your grounds.

MR. CASON: Your Honor, in that particular case, you know, we feel that it's going to be absolutely necessary to individually question these particular jurors on several issues.

First of all, Mr. Smith had pled guilty once before. It's very imperative that anyone in that voir dire not know anything about this case whatsoever, whether he has read it in the newspaper or seen it on three television stations or the various radio stations, you know, where the reversal came down and the newspapers published James Lewis Smith who formerly pled guilty to rape and sodomy, that will prejudice our client.

THE COURT: The court will voir dire the jury. You are permitted to submit any

* * *

Motion for New Trial

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA, Plaintiff,	•	
VS.	•	Case Nos. CC-1682/83/84-PR
JAMES LEWIS SMITH, Defendant.	•	

MOTION FOR NEW TRIAL

(Filed August 21, 1986)

COMES NOW the Defendant, by and through his attorney, John C. Cason who moves this Court to set aside the verdict entered in this cause on July 19, 1986, and grant to the Defendant a new trial. As grounds therefore, the Defendant shows as follows:

1. This Court's denial of the Defendant's Motion for the Trial Judge to Recuse himself was erroneous.

2. This Court's denial of the Motion to Suppress all evidence obtained following the custodial interrogation of the Defendant was erroneous and extremely prejudical [sic] to the Defendant's case.

3. The State failed to establish a prima facie case; accordingly, this Court's denial of the Defendant's Motion for Entry of Verdict of Acquittal at the close of State's evidence was erroneous.

4. The verdict of the jury was against the weight of the evidence.

5. The verdict of the jury was contrary to law.

WHEREFORE, the premises considered, the Defendant moves this Court to grant him a new trial in the above-styled cause.

Respectfully submitted,

/s/ John C. Cason
JOHN C. CASON
Attorney for
Defendant

/s/ Thomas J. Travers
THOMAS J. TRAVERS
Attorney for
Defendant

OF COUNSEL:

PERRY O. HOOPER, SR.
503 South Court Street
Suite 320
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Motion for New Trial* upon the Honorable Terry Travis, District Attorney's Office, Montgomery County, Alabama, 142 Washington Avenue, Montgomery, Alabama 36192-2501 by hand delivery this the 22nd day of August, 1986.

/s/ Thomas J. Travers
OF COUNSEL

Second Sentencing Hearing After Jury Trial

(p. R-395) RESPONDED IN THE AFFIRMATIVE.)

THE COURT: Mr. Smith, come forward. (Complies.)

THE COURT: The jury having found you guilty of sodomy in the first degree, rape in the first degree, and burglary in the first degree, the court hereby accepts these verdicts. Let the record show the jury is still in the box. I will record these verdicts on the proper court documents and set your case for sentencing on Friday morning, August 22nd at 8:30. Let Mrs. Flack know he is upstairs. All right. Take him up.

MR. CASON: Your Honor, we would waive the presentence report since there was –

THE COURT: All right. We do it Friday morning. I want Mrs. Flack to see him. All right.

– (Whereupon, all trial proceedings were adjourned.)

SENTENCING HEARING

(p. R-396) (Whereupon, the following proceedings occurred on August 22, 1986 as a matter of record with the defendant present:)

THE COURT: State of Alabama versus James Lewis Smith. Mr. Smith, you entered a plea of guilty to rape and burglary, and the court sentenced you to thirty years on a plea bargain agreement. However, the Court of Appeals reversed that on the grounds that you were not advised as they saw it to the minimum/maximum sentence that could have been imposed against you. The court, of

course, then had a trial in your case. You are here now for sentencing at this time.

Do you have anything to say as to why the sentence of law shouldn't now be imposed against you? Do you have anything to say?

THE DEFENDANT: Well, I guess not.

THE COURT: Does the state have anything?

MR. TRAVIS: Thie [sic] victim, Ms. Hurst, is here to tell the court anything she feels would be appropriate.

(p. R-397) THE COURT: Well, I have heard her testimony. I don't know of anything else that –

MR. TRAVIS: I'd like her to have an opportunity on the record to tell the court for purposes of sentencing what she would like to.

THE COURT: Well, what do you want to tell me?

MS. HURST: I think that he should get life because in a way I have gotten life.

THE COURT: Anything else?

MS. HURST: No.

THE COURT: Does the state have anything else?

MR. TRAVIS: I would make a motion for the Habitual Offender Act. There is one prior felony. That would make the sentence, the minimum and maximum fifteen to life, as I understand it. Now, there also has been a weapon used in these offenses, specifically a knife, which would make the minimum number and maximum twenty to life.

THE COURT: All right. Anything else?

MR. TRAVIS: I believe –

(p. R-398) THE COURT: Do you have a certified copy of the prior sentence?

MR. TRAVIS: I believe it's in the court's files from the court's prior pleas. It probably went up with the appeal on the plea before. It's in 85-1684. As a practical matter, the Habitual Offender Act would be lesser of a sentence than the fact there was a weapon involved.

THE COURT: I understand. Do you move to invoke the Habitual Offender Act?

MR. TRAVIS: I do because it's mandatory. As a practical manner, the sentence without the habitual offender would be less of a sentence than actually the mandatory with the weapon being used.

MS. FLACK: You have the original and I have the copy. Is that good enough?

THE COURT: Here is a certified copy which proports to be a certified copy from Madison County, case 75-10742-F from April 23, 1976, which proports to show the defendant was sentenced to three years in the penitentiary for the crime of burglary, grand larceny, buying and (p. R-399) receiving stolen property. And he was found guilty of buying and receiving and concealing stolen property on April 19, 1976. And the order further reads: after having been denied the further benefits of probation, he is hereby sentenced to the penitentiary for a period of three years as punishment. That is signed by Younger from the circuit court of Madison County.

Does he admit or deny?

THE DEFENDANT: Yes, sir.

MR. CASON: Adimit. [sic]

MR. TRAVERS: Admit, your Honor.

THE COURT: As I stated, your sentence can now be a minimum sentence – with the prior conviction, it would be from fifteen to life. However, since a weapon has been used – do you have the statute?

MR. TRAVIS: The statute concerning the weapon? Yes, sir.

THE COURT: Give it here. Let me put it in the record.

MR. TRAVIS: 13A-5-6, SUB (A)(4).

(p. R-400) THE COURT: All right. Let's read it.

MR. TRAVIS: For a class A felony in which a firearm of dealy weapon was used or attempted to be used during the commission of the felony, the minimum sentence is not less than twenty years.

THE COURT: So the sentence based on the Habitual Offender Act was fifteen to life; however, based on the weapon, from twenty to life. Okay. And you have had a trial. In addition to that, you charge of sodomy was reinstated against you which was nolle prossed based on the plea bargain agreement of a plea to rape and burglary. And of course, after the case was reversed, the sodomy charge was reinstated. Okay.

MR. TRAVIS: I would also point out to the court that at the time of the plea, the court was only aware and

was of the impression that it was only one sex act, that only one sex act took place. The court is now aware that five separate sex acts occurred, through the testimony.

(p. R-401) THE COURT: You had a trial and were convicted of rape, burglary and sodomy in the first degree. When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence – and the court by no means would increase your punishment beyond thirty years for rape and burglary on the fact that you were successful on your appeal because this court doesn't get into punishing or attempting to punish people for exercising all of their constitutional rights which is to appeal from a conviction or plea, or to have a trial if you so desire. There is nothing this court does which should be viewed as punishment for a successful appeal. I hope we all understand that. But under North Carolina versus Pearce, 395, [sic] U.S. 711; 23, [sic] L. Ed., [sic] 2d, [sic] 656; 89 S. Ct., [sic] 2072, the court finds that since I did not hear all of the testimony during your plea and now at trial have heard (p. R-402) all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, your performing oral sex on her, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain.

Okay. In addition to that, the Habitual Offender Act has been imposed. And taking everything into consideration from the events of the crime, in the case of 85-1684, burglary in the first degree, do you have anything to say now after the court has explained to you its position on after hearing all of the evidence that was presented during the trial? Do you have anything to say (p. R-403) before I sentence you?

THE DEFENDANT: No, sir.

THE COURT: In case number 85-1684, burglary in the first degree, the court hereby sentences you to life in the penitentiary.

In case 85-1682 in which you're charged with the criminal offense of sodomy in the first degree, do you have anything to say as to why the sentence of law shouldn't now be imposed against you?

THE DEFENDANT: No, sir.

THE COURT: The court hereby sentences you to life in the penitentiary.

In case number 85-1683, the sentence is from twenty to any years to life; is that correct?

MR. TRAVIS: Yes.

THE COURT: The court is going to order the sentence imposed in 85-1682 to run concurrent with the sentence imposed in 85-1684.

In case number 85-1683, you're charged with the criminal offense of (p. R-404) rape in the first degree. Do you have anything to say as to why the sentence of law shouldn't be imposed against you?

THE DEFENDANT: No, sir.

THE COURT: The court is going to sentence you to 150 years in the penitentiary.

MR. TRAVIS: The state moves at this time for restitution in the amount of $292.16.

THE COURT: The court is going to order restitution in the amount of $292.16 and the court is going to order the commissioner of the the [sic] Board of Corrections – if you receive any money while in the penitentiary, he is to instruct his staff to deduct $292.16 to pay into the clerk's office of Montgomery County as restitution in this case.

The court is going to order that you pay court costs in this matter and order the commissioner of the Board of Corrections that if you receive any money while in the penitentiary, that he instruct his staff to deduct a certain amount to be paid into the clerk's (p. R-405) office of Montgomery County as court costs in this matter. That's in each case.

The court is going to order that if he is ever released from the penitentiary, that within six months of your release, you are to pay the court costs in each case.

The court further orders you to pay $25.00 to the clerk's office to be paid to the victims compensation fund.

The court is going to instruct the commissioner of the Board of Corrections that if you receive any money while in the penitentiary that he instruct his staff to deduct $25.00 in each case to be paid into the clerk's office of Montgomery County to be paid to the victims compensation fund. If you are released from the penitentiary,

within six months after your release, this money is to be paid.

MR. CASON: Rape one, is that to run concurrent?

THE COURT: Consecutive.

(p. R-406) MR. TRAVERS: We would ask for a motion for a new trial.

THE COURT: I will set it down for a hearing.

(Whereupon, all proceedings from this hearing were adjourned.)

MOTION FOR NEW TRIAL

(Whereupon, the following proceedings occurred on August 29, 1986, and Mr. Cason waived his client's presence.)

THE COURT: All right. This is a hearing in the case of the state of Alabama versus James Lewis Smith. Motion for new trial. All right.

MR. CASON: We have filed a motion for new trial. The premise behind that is: first, recusal of the trial judge. Prior to trial, the defense attorneys had requested recusal which was denied, and we feel like the sentence inflicted in this particular case is even that much more reason for recusal.

Our second element in asking for a motion for new trial is the suppression which was denied by the (p. R-407) trial court. Again, we reiterate for the record there were no formal rights read to the individual at the time that he was arrested. Let me correct that. There was no

formal reading of his rights at the time that he was in custodial interrogation. In addition, there was no testimony to the fact that he was actually arrested and read his rights after being arrested.

Thirdly, we feel that the lineup that was done at the police station was highly too suggestive and should have been suppressed.

Fourthly, we definitely feel the only Miranda warning read to Mr. Smith at 10:02 in the morning was a deprivation of his constitutional rights in that the warning that the Montgomery Police Department uses does not reflect a proper Miranda warning.

More importantly and finally, under the suppression hearing, we feel as though the evidence showed that the probable cause of the Montgomery Police (p. R-408) Department was simply the fact that based on at that time some uncredible type of testimony was given of quote an individual raking a yard unquote. The record shows that the victim in this particular case told the police that someone quote named James raped me unquote.

THE COURT: I understand the probable cause. It's not based on the fact that someone was raking the yard. I understand it was probable cause based on the fact that the victim said a guy named James that lived two apartments up living with a woman named Katie Gardner raped me and they went looking for – went canvassing the area and found a fellow raking the yard and asked about a James who lived with Katie Gardner, and he said that he was up at Dobey's Inn. That's what I remember it to be.

MR. CASON: Right. Fifthly, as far as a prima facie case, we feel the state had a burden to prove each and every element beyond a reasonable doubt, and one (p. R-409) element of rape is the fact that it must be proven that the victim and the defendant are not married. This element was never proven to the trial court.

THE COURT: That they are not married?

MR. CASON: Yes. That they are not married to each other. This was not proven. I don't believe it can be inferred from the record that they were married. This is an absolute element that we feel has to be proven to the trial court. As such, a motion for directed verdict of acquittal, this was denied.

And finally, we feel like the sentence was excessive. Based on the case law the trial court quoted to us at sentencing, we interpret that case law to say that it's not based on testimony heard within the case that can reflect an increase of sentence, but based on facts which are heard or about events that take place prior to trial after the initial crime has been committed that warrants an increase in the sentence, not the substantive issues of the case.

(p. R-410) THE COURT: Well, between the first trial and the second trial, the events became apparent.

MR. CASON: Yes.

THE COURT: That's when he wrote the court and admitted that he raped the woman.

MR. CASON: Right. Which we feel goes to the substantive issues involved in the case. We contend that that

case law goes to – the increase of sentence goes to material things that occur after the initial crime has been committed.

THE COURT: Well, one of the material things was that –

MR. CASON: That would aggregate the circumstances, obviously, to listen to the victim when the court took the plea given the facts to accept the plea bargain that was reversed.

THE COURT: The court had no knowledge that he raped the woman five times, and he didn't contradict that. He sodomized her twice by him performing oral sex on her and then he on her, with the children across the hall, with the knife (p. R-411) basically at her throat at all times except when he so-called put it in her hand and pointed it towards him and said do to me what you want to do at 1:00 or 2:00 A.M. with a ski mask on, who has gotten through the window as shown with the screen being missing, and that was not – the court was not aware of that at the plea. I feel like perhaps the sentence may not have been harsh enough.

MR. CASON: Yes, sir.

THE COURT: All right. On the other points of your motion, it's denied on the issue of suppression and recusal and the others. The court has already stated my position on recusal. I don't know of any reason why I should have rescused myself. It's just another case that I tried. I had no preconceived idea about the case between the time the plea bargain was reversed – I felt no different at that time of the trial than before the trial, saying that I

had no thoughts at all perhaps. Your motion is denied on that ground.

(p. R-412) The lineup suggested either – there is no scintilla of evidence to suggest that that was wrong. The motion is denied on those grounds.

On the warrant, I issued a ruling on that. Denied on that.

MR. CASON: One other thing, your Honor. We filed a motion for new trial based upon the premise that certain evidence was precluded based on the fact that it could not come into evidence because of the rape shield law. We question the constitutionality of the rape shield law.

THE COURT: The legislature enacted it and the Courts of Alabama have upheld it. I ruled on whatever you wanted to get in, that if it was protected by the rape shield law, you couldn't get it in. Appellate courts and the legislature have said that. I went by that.

MR. CASON: We are putting in the record that it is unconstitutional.

THE COURT: Your motion is denied on all points. I will make this hearing and my (p. R-413) ruling part of the record.

MR. CASON: Thank you, Judge. We would like to give the court oral notice of appeal.

THE COURT: All right. The court accepts the oral notice of appeal. However, file a written notice. Plus, is the defendant – yes, he is indigent. Go ahead and file a motion on that.

MR. CASON: Your Honor, if we may do this, if it's appropriate: as far as myself, I would like permission to withdraw from the appeal and let Mr. Travers who worked on this case pro bono to be appointed to take it up on appeal.

THE COURT: Motion denied. The court appoints you to represent the defendant on appeal. All right. You are all in the same office, and whoever does the work, I don't know. All right.

(Whereupon, all proceedings from this hearing were adjourned.)

Court of Criminal Appeals Opinion Affirming Conviction and Enhanced Sentence

MAY 26 1987

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

3 Div. 574

James Lewis Smith

v.

State

Appeal from Montgomery Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

This is an appeal from judgments of conviction and sentence following a jury trial in which defendant-appellant was found guilty of burglary in the first degree, rape in the first degree, and sodomy in the first degree, for which he was sentenced to imprisonment for life as to the convictions for burglary and sodomy, to run concurrently with each other, and 150 years for the conviction of rape in the first degree, with such sentence to run consecutively to the sentence in the other two cases. This case had previously been before this Court, on appeal from judgments of conviction and sentence for first degree burglary and first degree rape; those judgments were based on defendant's plea of guilty pursuant to plea bargaining agreement made with the understanding that

the charge of sodomy would be nol-prossed. The judgments of conviction and sentence were reversed, *Smith v. State*, 494 So.2d 182 (Ala.Cr.App. 1986).

As the brief of counsel for appellee in the instant case adopts the statement of the case and the statement of the facts as found in brief of counsel for appellant, we quote from the brief of counsel for appellant the following, in which we omit the name and identity of the female victim so as to preclude unnecessary embarrassment to her (in the quotation hereinafter made we will refer to her merely as the victim):

> "This case concerns the alleged rape and sodomy, resulting from the burglary at the place of the alleged victim. She testified that in the early morning hours of September 14, 1985, . . . a man's head peeked around the bedroom door wearing a mask. The man closed the door behind him and approached the victim with a knife in his hand. The man was dressed in his underwear with a mask on his head. The man put his hand on the victim's mouth and told her not to scream.
>
> "The victim described the mask the man was wearing as a ski mask with the eyes, nose and mouth cut out, and described the knife as a small kitchen knife. She then testified that the assailant pulled her down on the bed, removed her panties and began to have sex with her. The assailant never removed the hood from his face. The assailant had sex with the victim in several different positions. During this, the assailant and the victim spoke. The victim testified there were more than four different acts of sex of sexual intercourse, including oral sex. The victim testified in each sexual act there was penetration.
>
> "The victim then testified that while the knife was usually in his hand during this period of time, he had at one time laid the knife on the bed and at one time

> placed the knife in her hands. At the time he brought the knife up to his chest and pulled her hand over the knife in the center and said, 'You've got the knife, go ahead and kill me.' The victim testified that 'she couldn't kill him.' She stated that she did not use the knife on him because she was afraid.
>
> "During the attack, the victim stated that she recognized the assailant's voice and she could recognize his eyes because he had real heavy eyebrows and his mouth and the way he was built. She stated that all she knew at the time was that she believed the attacker to be 'James', a boyfriend of an acquaintance of hers that lived nearby. The victim stated that she had an opportunity to hear the voice of James more than 25 times prior to the attack. The victim testified the attack took place over a period of time greater than an hour.
>
> "Following the attack, the victim called a police officer friend of hers, who reported the incident to the police. Investigator Renee Grimsley of the Montgomery Police Department arrived on the scene in response to this call. A short time later, the victim described to Officer Grimsley the attacker as a 'James' who lived in a house up the street with a girl friend. The victim did not know the last name of the person known as 'James'. Then Officer Hurst completed the incident or offense report. In this report, Hurst described the assailant as a black man in his twenties, with a height of 5' 6" tall and weight of 130 pounds. It provided no name, not even 'James'. It contained no response for address or probable destination of the assailant. Under the portion of the offense report requesting information with the questions 'can a suspect be named?' the box marked 'No or Unknown' was completed. Several days after the complaint, Investigators Grimsley and Faulkner began their investigation. On September 18, 1985, the officers approached an unknown subject raking grass or leaves and requested information as to whether he knew where a subject by the name of 'James' that

lived with ___ could be located. This subject told the officer that such a person was at Doby Motel on the Mobile Highway. The officers proceeded to this motel to contact this 'James'. At the motel, they found James Smith. They indicated they wanted to talk to him regarding the alleged incident involving the victim. The officers transported Smith to the Montgomery Police Department in a police car. Officer Grimsley then advised Smith of certain 'rights' and had Smith sign a 'rights form'. Smith indicated a willingness to answer questions at that time and denied any involvement with the incident. The officers then began to collect evidence from Mr. Smith including hair and saliva samples, as well as a blood sample. The officers then contacted the victim to come to the police headquarters for a voice lineup which Smith was to participate in. Smith participated in this lineup and the victim identified Smith's voice as that of the assailant. The officers then approached Smith and confronted him with the results of the voice lineup; . . . As a result of the voice lineup, the officers placed Smith under arrest with the charges of rape, burglary and sodomy. Officer Grimsley testified that up until the time following the voice lineup, Smith would have been free to go had he requested. These are the facts of the case upon which Smith appeals his conviction on a charge of burglary, rape and sodomy."

We now quote from the testimony of Officer Margaret Faulkner, a witness for the State:

"Q. Did you have an occasion to be called to a response of some form of assault alleged to have occurred on Hatton Avenue?

"A. Not on the 14th I wasn't. I did not get involved until the 18th.

"Q. Are you the partner of – were you at that time the partner of Officer Grimsley?

"A. Yes, I was.

"Q. And did you do anything with the case between the 14th and the 18th?

"A. No, I did not.

" . . .

"Q. What was your involvement on the 18th?

"A. We had talked with the victim and went back and canvassed the area of the assault, the apartment area where she lived in out there.

" . . .

"Q. Who did you speak to over there? Did you speak to anybody in particular?

"A. We spoke to the victim, and we spoke to a guy named – he was raking leaves. Wait a second and I will give you his name. A black male named Rene that was raking leaves out there at the apartment complex.

" . . .

"Q. Did you have an occasion later on the 18th to approach Mr. Smith who is seated right here? (Pointing to defendant).

"A. Yes, sir, I know him.

"Q. Where did you first meet Mr. Smith?

"A. At Doby's Motel.

" . . .

"Q. Did you suspect him or anything at that point?

"A. Yes, sir. He was a suspect.

"Q, Did you inform him that he was a suspect?

"A. Yes, sir.

"Q. And where did you take Mr. Smith?

"A. To Police Headquarters.

"Q. What did you do with Mr. Smith there?

"A. We read him his rights.

" . . .

"A. We informed him that we needed to talk with him in reference to a complaint of sexual assault and burglary that happened at his apartment complex, and that his name had come up in the investigation. That's exactly what we informed him.

"Q. And what did he say?

"A. He said he didn't know anything about it, but he would be glad to come down to headquarters and talk with us. We asked him if he would.

"Q. So when you went down to headquarters, did you ask him – again, this is prior to any tests or specimens being taken from him. Did you ask him again if he knew anything about after reading his rights?

"A. Yes, sir.

"Q. And what was his response then?

"A. He didn't know anything about it.

"Q. Now, did you participate in forming a voice identification lineup?

"A. Yes, sir, I did.

"Q. What was your participation in that?

"A. I was with [the alleged victim].

"Q. Did you assist her in picking the persons that participated in this lineup?

"A. Who, Rene Grimsley [another police officer]?

"Q. Yes, I'm sorry.

"A. Yes, I did.

"Q. Were you in the room while the voice identification lineup was taking place?

"A. What do you mean?

"Q. Well, after [the alleged victim] had identified somebody, were you in the room at that time?

"A. Yes, I was.

"Q. Tell me how the voice identification lineup was conducted?

"A. We had [the alleged victim] in Sgt. Ingram's office, there's a door adjoining Lt. – I mean, it's Lt. Ingram's office. And there is a door that adjoins the two offices that goes from one office to Lt. Gant's office. [the alleged victim] was in Sgt. Ingram's office sitting in a chair. We opened the door. We let each black male come in and read three sentences.

"Q. Are those the three black males that you believed participated in that voice lineup?

(referring to photographs).

"A. Yes, sir.

"Q. Did you tell the statements to each of the persons and then they repeated them back to you?

"A. The words? The sentences? Yes – no. We gave them a piece of paper that had what we wanted them to read back on them.

"Q. To all of the people?

"A. As they came in, one at a time.

"Q. So each of them read from a paper. Nobody repeated what anybody had to say?

"A. They read. There were three sentences that [the alleged victim] wanted – that she said she remembered this guy saying. And we wrote those sentences down on a piece of paper and gave them to each

black male as he entered the room and asked him to read those sentences.

"Q. So nobody said anything that you said, repeat after me? Nobody said anything like that?

"A. No. No, not that I recall.

"Q. I want you to do me a favor and let's read statement number one there. Read it to me in about the same tone or the same volume that you would have had those persons say it.

"A. We just asked him to read it. We didn't ask them to put any kind expression in it.

"Q. You observed it though?

"A. I heard it.

"Q. Can you tell me the type of volume that they used in reading it?

"A. Don't do that. Don't do that. Some was louder, some was softer, some was more verbal than others in it.

"Q. After that, did you tell Mr. Smith he had been identified in the voice lineup?

"A. I didn't; Investigator Grimsley did that.

"Q. Were you there when she did that?

"A. Yes, sir.

"Q. Did you participate in taking a statement from Mr. Smith?

"A. I was in the room, but I did not do any of the questioning.

"Q. You were in the room during the taking of the statement?

"A. Yes, sir.

"Q. Did you help coach Mr. Smith at all?

"A. What do you mean by coaching?

"Q. If he had difficulty with an answer, did you maybe help provide him with an answer?

"A. No, sir.

"Q. Did Officer Grimsley maybe help provide him with an answer to?

"A. I don't know waht you mean exactly by help providing. We asked questions and he answered.

"Q. Well, if he didn't know something, did you kind of mouth something to him or help him with an answer?

"A. We might have explained our question, but as far as coaching him in an answer, no, we didn't.

"Q. Were you present when the typed statement was prepared?

"A. I was present when we got it back; yes.

"Q. Did you allow Mr. Smith to go over the typed statement?

"A. I don't think I did. I don't recall.

"Q. Did you allow Mr. Smith to read the typed statement and sign it?

"A. No, sir."

The following are the issues raised on this appeal, which we will hereinafter consider in the order raised in brief of counsel for appellant:

I. WAS THE INVESTIGATORY PICKUP OF SMITH BY THE POLICE OFFICERS ON SEPTEMBER 18, 1985, AN UNLAWFUL ARREST AS IT WAS NOT SUPPORTED BY PROBABLE CAUSE?

"II. DID THE TRIAL COURT COMMIT ERROR BY ADMITTING THE STATEMENT OF THE DEFENDANT INTO EVIDENCE?

"III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY REFUSING TO RECUSE ITSELF FROM THIS CASE?

"IV. WAS THE SENTENCE IMPOSED BY THE TRIAL COURT IN THIS CASE AN UNLAWFUL SENTENCE UNDER THE LAW, OR IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS?

I.

In the brief of counsel for appellant as to this issue, it is stated:

"Since such an arrest is illegal, it has been held that the confession obtained through a custodial interrogation following an illegal arrest should be excluded, unless intervening events break the causal connection between the arrest and the confession so the confession is sufficiently an act of free will to purge the primary taint. *Taylor v. Alabama,* 457 U.S. 687 (1982).

"As a result of apparent information given by [the victim] that her assailant might be a man named 'James' who lived with a friend named ___ (despite her signed statement on the date of the offense that no name for the assailant was known), Officers Grimsley and Faulkner proceeded to canvass the area in search of this person. The officers contacted an unnamed and apparently unknown person who referred them to Doby's Motel to find a 'James' living with a ___. There was no testimony or evidence presented at trial as to the identity or credibility of this source. The officers approached James Smith at Doby's Motel and asked him to accompany them downtown for investigatory questioning. Officer Grimsley testified that Mr. Smith was free to go at any time during the period of interrogation prior to the voice lineup (R-190). For this interrogation, the

Defendant was brought to a room in police headquarters, the door was often shut, and possibly locked, Mr. Smith was questioned regarding the incident throughout the period of time he was in this room, hair pullings were taken from Mr. Smith, saliva samples were taken as well as blood drawn from Mr. Smith. To the question asked of Officer Grimsley, 'Why didn't you just question him at Doby's?', she responded, We don't handle investigations that way. We take people back to our office to talk to them.' As a result of this arrest, the police officers obtained a confession from Mr. Smith as well as samples for physical evidence and a voice lineup identification by the victim.

"The record is clear that the officers did not have probable cause to arrest Mr. Smith at that time. The officers' information at that time was limited to a first name, no known street address, the first name of someone with whom he was alleged to have lived with, and information provided by an unknown source of unknown credibility. The information which led the officers to focus their attention on James Smith was provided not by the victim in this case, but rather by the individual raking leaves. Accordingly, at the time of the pickup of a James Lewis Smith by Officers Grimsley and Faulkner, they might have had reasonable suspicion to question briefly James Lewis Smith; however, they clearly did not have probable cause to arrest Mr. Smith. The elements of the *Dunaway* case apply to this case: Smith was taken from the scene in a police car, was placed in a room for interrogation, and was not told he was free to go. Therefore, the 'investigatory' taking into custody of Mr. Smith was an unreasonable seizure in violation of Smith's constitutional rights as delineated in the *Dunaway* and *Taylor* decisions noted above.

"The taint of the illegal arrest was not purged by the circumstances of this case. In determining whether the confession has been purged of the taint of the

illegal arrest, the factors to be considered include the temporaral proximity of arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of official misconduct. *Taylor v. Alabama, supra.* In the *Taylor* case, the illegal arrest was not cured by the fact that six hours had elapsed between the arrest and the confession; in the case at bar more than 4 and 1/2 hours has elapsed. In the *Taylor* case, the illegality of the arrest was not cured by the fact that Miranda warnings were given before the confession; in the case ar bar possible Miranda warnings were given only once, and even then several hours prior to the confession, thus no cure through those warnings. It can certainly be argued that the police contact was purposeful and a flagrant attempt to strengthen their case by gathering evidence from Mr. Smith prior to an arrest. The police officers knew fully well that following arrest, Smith might well be less inclined to cooperate with the officers. This conduct can be shown by the police officers' refusal to permit Mr. Smith to review his confession after it had been typed. This denial prevent Mr. Smith from recanting this confession once the pressure of the moment had passed. Therefore, applying the factors listed, it is clear that the investigation conducted by the officers upon Mr. Smith was in fact a warrantless arrest unsupported by probable cause; accordingly, none of the decisions cited, the evidence obtained as a result of this action and which had not been cured of its taint should have been excluded. Therefore, it was an error for the trial court to admit this evidence; the conviction of the defendant should therefore be reversed and remanded with instructions to the trial court to grant the defendant a new trial and to exclude all evidence resulting from this illegal arrest."

We do not agree with the position taken by counsel for appellant as stated above. Although the law enforcement officers succeeded in their effort to obtain confessions from the defendant as to the burglary, sodomy by force, and rape of the alleged victim by their conversations with the defendant, they had otherwise obtained sufficient evidence from the victim herself that justified their arrest of the defendant.

II.

For reasons stated under Issue I above, we determine that the trial court did not commit error by admitting the statement of the defendant into evidence, as contended by Issue II raised by appellant's attorney.

III.

Although counsel for appellant makes a strong argument in his brief in favor of the issue that the trial judge committed reversible error in refusing to recuse himself from the trial of the case now on appeal, he fails to cite any authority which supports appellant's position as to this issue and we are not convinced that the issue should be decided favorably to appellant.

IV.

We do not agree with all of the contentions of counsel for appellant as to this issue, but we are of the opinion that he is correct as to the contention made in his brief as follows:

"the sentence of 150 years on a charge of Rape I is in violation of the *Code of Alabama*, 1975. Smith was sentenced to 150 years on his conviction of rape in the first degree. The *Code of Alabama 1975*, § 13A-5-6(a)(1) states that the term of imprisonment for a Class A felony is limited to a time of life or not more than 99 years nor less than 10 years. Further, § 13A-5-6(a)(4) provides that for a Class A felony in which a deadly weapon was used the term of imprisonment is to be not less than twenty years. This Section was invoked by the State at the time of sentencing. The decision of *Smith v. State*, 447 So.2d 1327 Ala.Cr.App. 1983), affirmed, 447 So.2d 1334 (Ala. 1984), states the Code Section is to be construed as a whole and therefore it is clear that the maximum times are in fact supplied by subsection (a)(1), described above; accordingly, the maximum term for sentencing pursuant to § 13A-5-6 for a Class A felony where a deadly weapon is used is for life or not more than 99 years. Therefore, the sentence of 150 years was unlawful."

It is our opinion that the judgments of conviction should be affirmed, but that the judgment of sentence to imprisonment for 150 years is not correct and that the case should be remanded for proper sentencing on the rape charge. Adequate notice should be given to the parties of the time and place of the sentencing hearing, and the trial court will make return to this order of remand with notice thereof to the parties; either party aggrieved thereby will have the right within fourteen days to file a brief in support of the position taken by said party and the opposing party will have seven days thereafter in which to file a reply brief.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this

Court under the provisions of § 6.10 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of this Court.

CONVICTIONS AFFIRMED; SENTENCES FOR BURGLARY AND SODOMY AFFIRMED; REMANDED FOR RESENTENCING ON THE RAPE CONVICTION.

ALL JUDGES CONCUR.

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE COURT OF CRIMINAL APPEALS OF ALABAMA

3rd *Div., No.* 574

JAMES LEWIS SMITH, *Appellant,*

v.

THE STATE, *Appellee,*

From MONTGOMERY *Circuit Court*

The State of Alabama,)
City and County of Montgomery.)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the foregoing pages numbered from one to eleven *inclusive, contain a full, true and correct copy of the opinion of said Court of Criminal Appeals in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, at the Capitol this the 26th *day of* May, 1987.

/s/ Mollie Jordan
Clerk of the Court of Criminal Appeals of Alabama.

Alabama Supreme Court Opinion
Affirming the Conviction but
Remanding for Re-sentencing

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1987-88

Ex parte James Lewis Smith

86-1448

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: James Lewis Smith
v.
State of Alabama)

JONES, JUSTICE.

The petitioner was arrested and indicted on charges of rape, burglary, and sodomy, all arising out of the same alleged incident. As a result of a plea bargain agreement, the sodomy charge was nol-prossed and the petitioner pleaded guilty to the charges of first degree rape and first degree burglary. After a sentencing hearing, the petitioner was sentenced to 30 years on each conviction, the sentences to run concurrently.

Subsequently, the petitioner filed a motion seeking to withdraw his guilty pleas, claiming that he did not enter the guilty pleas knowingly or voluntarily. The trial court denied this motion. The Court of Criminal Appeals, however, found that the petitioner had not been properly informed of the potential sentences before pleading guilty, reversed the conviction and sentences, and

remanded the cause to the trial court. *Smith v. State*, 494 So.2d 182 (Ala.Cr.App. 1986).

The State then moved to reinstate the charge of first degree sodomy. On remand, the case was reassigned to the same trial judge, and he granted the State's motion to reinstate the original indictment. After a hearing on a number of defense motions, trial was conducted on the merits of the case. The jury returned a verdict of guilty on all three counts. After a sentencing hearing, the petitioner was sentenced to life imprisonment for the conviction of first degree sodomy, which term was to run concurrently with a life term for the first degree burglary conviction. The petitioner was also sentenced to a term of 150 years for the conviction of first degree rape, that sentence to run consecutively to the other two sentences. The Court of Criminal Appeals affirmed the conviction, affirmed the life sentences for the sodomy and burglary convictions, and remanded to the trial court for resentencing on the rape conviction.

We granted the defendant's request for review of the Court of Criminal Appeals' judgment affirming the judgment of sentence that enhanced the petitioner's sentence for burglary from 30 years to life imprisonment. The 150-year sentence for rape and the life sentence for sodomy are not before us for review. We reverse and remand as to the enhanced sentence for burglary.

In the resentencing of the petitioner after remand and conviction, the trial court stated:

> "The court finds that since I did not hear all the testimony during your plea and now at trial have heard all the testimony. . . ., the court finds that it's proper to increase the [burglary] sentence beyond that which was given you on the plea bargain."

It is clear that the trial judge increased the petitioner's sentence because of his subjective observations and not because of any objective evidence of events subsequent to the petitioner's first conviction. We adopt the language from *Rice v. Simpson*, 274 F.Supp. 116 (M.D.Ala. 1967), affirmed, 396 F.2d 499 (5th Cir. 1968), affirmed sub nom. *North Carolina v. Pearce*, 395 U.S. 711 (1969), as the applicable rule in Alabama:

> "[T]here can be no increase in a sentence in a criminal case after the sentence is imposed. . . . To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and do so successfully is unfair discrimination and does nothing except to serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies."

274 F.Supp. at 122. See, also, *Ex parte Tice*, 475 So.2d 590 (Ala. 1984).

In support of the affirmance of the petitioner's enhanced sentence in the burglary conviction, the State quotes the following language from *North Carolina v. Pearce*, 395 U.S. 711 (1969):

> "A trial judge is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams v. New York*, 337 U.S. 241, 245. Such information may come to the judge's attention from evidence

> adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York, supra*, that a state may adopt the prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. *Id.*, at 247."

395 U.S. at 723.

The State's reliance on *Pearce* is misplaced. Indeed, in unmistakable terms, the holding in *Pearce* makes it abundantly clear that the authorization for an enhanced resentencing "in the light of events subsequent to the first trial" is an exception to the general rule that, absent such evidence, a sentence imposed at the first trial may not be enhanced upon reconviction at the second trial after the first conviction was been overturned on appeal and remanded for a new trial.

REVERSED AND REMANDED.

Torbert, C.J., and Almon, Shores, Houston, and Steagall, JJ., concur.

Maddox, Beatty, and Adams, JJ., dissent.

Ex parte James Lewis Smith

MADDOX, JUSTICE (Dissenting)

I do not believe that the trial court erred in enhancing the petitioner's sentence. In some respects, this case is similar to *Wesley v. State*, 481 So.2d 1155 (Ala.Cr.App. 1985), reversed and remanded, 481 So.2d 1162 (Ala. 1985), on remand, 481 So.2d 1163 (Ala.Cr.App. 1985). In that

case, Wesley was indicted for robbery in the first degree, and that indictment was amended to charge attempted robbery. He pleaded guilty to that charge, but his plea was set aside on appeal because the general attempt statute was no longer applicable to robbery offenses. *Wesley v. State*, 448 So.2d 468 (Ala.Cr.App. 1984). Wesley was retried on the same indictment, but for robbery in the first degree, and the Court of Criminal Appeals affirmed his conviction on that charge. This Court reversed that decision of the Court of Criminal Appeals, saying: "It follows that when the State of Alabama chose to try petitioner again on the void amended indictment, his conviction was erroneous. However, as stated in *Wesley, supra*, the State of Alabama is free to *reindict* petitioner for the appropriate offense. *Williams v. State*, 333 So.2d 613 (Ala. 1976)." *Ex parte Wesley*, 481 So.2d 1162, 1163 (Ala. 1985) (emphasis added). Implicit in this holding is the idea that Wesley could receive a higher sentence than was imposed when he pleaded guilty, because he could be retried for robbery I.

Furthermore, charge and sentence concessions can be made when an accused voluntarily enters a plea of guilty, and the principles of *North Carolina v. Pearce*, 395 U.S. 711 (1969), would not apply. Instead, the principles of *Brady v. United States*, 397 U.S. 742 (1970), would apply. The Supreme Court of the United States held in *Brady* that sentence concessions may be made constitutionally when persons plead guilty. the Court held:

> "Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilt plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime

charged if a conviction is obtained after the State is put to its proof.

" . . . We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

" . . . For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilty may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. . . .

" . . . But we cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the State. . . ."

397 U.S. at 750-53.

Standard 14-1.8. of the American Bar Association Standards for Criminal Justice provides:

"(a) The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty of nolo contendere when consistent with the protection of the public, the

gravity of the offense, and the needs of the defendant, and when there is substantial evidence to establish that:

"(i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct;

"(ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

"(iii) the defendant, by making public trial unnecessary, has demonstrated genuine consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them; or

(iv) the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

"(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere."

In this case, petitioner successfully attacked his guilty plea on the basis that the maximum possible sentence was not explained to him; his plea was not, therefore, knowingly and intelligently given.

It would appear to me that a petitioner should not be allowed to receive sentence concessions in return for a

guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial. Thus, a petitioner could go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given.

The facts of this case are dissimilar to *North Carolina v. Pearce*, in my opinion, and I would affirm the judgment of the Court of Criminal Appeals; consequently, I must respectfully dissent.

Adams, J., concurs.

Alabama Supreme Court Opinion and Dissent Denying Petitioner's Rehearing

On Application for Rehearing

JONES, JUSTICE.

APPLICATION FOR REHEARING OVERRULED.

Almon, Shores, Houston, and Steagall, JJ., concur.

Torbert, C. J., and Maddox, Beatty, and Adams, JJ., dissent.

Ex parte James Lewis Smith

MADDOX, JUSTICE (Dissenting from denial of rehearing).

The majority denies the State's application for rehearing without comment, apparently on the ground that the State has presented nothing new for the Court to review. I believe the State has shown in its brief why the case of *North Carolina v. Pearce*, 395 U.S. 711 (1969), is not applicable here. Because the majority fails to distinguish cases cited in the State's brief that indicate to me that we should grant rehearing in this case, I take this opportunity to extend the dissent which I filed on original deliverance. In my opinion, the Supreme Court of the United States has refused to broaden the scope of *Pearce*, especially in fact situations such as that presented here.

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the defendant, with counsel, and the prosecutor, entered into plea negotiations whereby the prosecutor offered to recommend a five-year sentence if the defendant would

plead guilty as charged to uttering a forged instrument. The prosecutor told the defendant that if he did not plead and save the court the inconvenience and necessity of a trial, he would return to the grand jury and seek an indictment under the habitual offender law, subjecting the defendant to a mandatory sentence of life imprisonment. The defendant rejected the offer, and the prosecutor obtained an indictment charging him under the habitual offender law. The defendant was subsequently tried and convicted and sentenced to life imprisonment. The defendant then challenged the prosecutor's actions, claiming it was an impairment of his constitutional rights to a trial. *Id.* at 359. The Supreme Court found *Pearce* to be distinguishable. In *Pearce*, the State unilaterally imposed a penalty upon a defendant who had chosen to exercise his right to appeal his original conviction. The Court found this was a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Id.* at 362. The Court further stated:

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' . . . But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.
>
> Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial."

Id. at 363 (citations omitted).

The Court found the prosecutor's action to be constitutional, stating that a "rigid constitutional rule" prohibiting a prosecutor from acting forthrightly in his dealings with the defense "could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." *Id.* at 365.

Although *Bordenkircher* dealt with prosecutorial vindictiveness rather than judicial vindictiveness, its reasoning is persuasive in the instant case. Here, as in *Bordenkircher*, the petitioner was given the option of either accepting the plea bargain or insisting upon trial. Further, just as the defendant in *Bordenkircher* was aware of the consequences of rejecting the prosecutor's offer of a plea bargain, the petitioner in this case was aware of the consequences of setting aside the plea bargain. The supplemental transcript indicates that the petitioner was aware that the sodomy charge was *nol-prossed* only because of his guilty plea. Additionally, he was aware that the maximum sentence he could receive for burglary I was life imprisonment and that that was the maximum sentence for rape I as well. As is the custom where a court sentences an accused following a guilty plea, the court in this case displayed leniency in sentencing the petitioner to concurrent sentences of 30 years for burglary I and rape I. However, petitioner chose to forgo this leniency, and by appealing his conviction, withdrew his plea, thus tacitly repudiating his plea bargain agreement. See *Moore v. Foti*, 546 F.2d 67 (5th Cir. 1977). Thus, petitioner chose to subject himself to the possibility of receiving life sentences for rape I and burglary I if convicted

and having reinstated the sodomy I charge with its maximum sentence of life imprisonment.

The Supreme Court of the United States further narrowed the scope of *Pearce* in *United States v. Goodwin*, 457 U.S. 368 (1982), and *Ricketts v. Adamson*, ___ U.S. ___, 107 S.Ct. 2680 (1987). In *Goodwin*, the Court did not find prosecutorial vindictiveness where the prosecutor charged a misdemeanor defendant with a felony after he made a demand for a jury trial. In *Ricketts*, the defendant was allowed to plead guilty to second degree murder in exchange for his testimony against several co-defendants. Subsequently, the defendant repudiated the agreement by refusing to testify at the co-defendants' retrial. The prosecutor reinstated the original first degree murder charge against the defendant. The defendant was tried, convicted, and sentenced to death. The Supreme Court upheld the conviction finding that the defendant had chosen to face the possibility of the death penalty by repudiating the plea agreement. *Id.* ___ U.S. at ___, 107 S.Ct. at 2686.

The Fifth Circuit Court of Appeals also has applied the analysis of *Pearce* and *Bordenkircher* to instances of alleged prosecutorial vindictiveness, and that court has also applied this reasoning to the analogous issue of judicial vindictiveness.

In *Foti*, supra, the defendant sought habeas corpus relief in federal court to stop the State from reinstating first degree murder charges against him. The defendant, a juvenile, was initially charged with first degree murder

but pleaded guilty to murder in the second degree pursuant to a plea bargain. However, the defendant successfully challenged his conviction in the appellate courts, and upon remand the State reinstituted the first degree murder charge. In his federal habeas corpus petition, the defendant asserted that this action placed him in double jeopardy. The Fifth Circuit rejected this argument and stated that the defendant's successful challenge to his plea bargained sentence was a "tacit repudiation of the bargain, allowing the government to prosecute him on the greater charge." 546 F.2d at 68.

Although *Foti* dealt with double jeopardy issues, its reasoning is useful in the instant case. Like the defendant in *Foti*, the petitioner in this case successfully challenged his plea bargained conviction and sentence because he was obviously unsatisfied with the sentence initially imposed. *Foti* held that in such an instance, the defendant's action is a "tacit repudiation" of the plea bargain agreement and he must face the consequences of his decision.

Like the defendant in *Foti*, the petitioner in this case repudiated the plea agreement. By this action, he not only permitted the State to reinstitute the sodomy I charge, but also permitted the trial court to enhance his sentence, because the sentence initially imposed was at least partly the result of leniency shown because he did not inconvenience the court and cause embarrassment to the victim when he chose to plead guilty to the charges rather than to stand trial.

In *Frank v. Blackburn*, 646 F.2d 873 (5th Cir. 1980), the analysis of *Bordenkircher* was applied to the issue of judicial vindictiveness. In *Frank*, the defendant attacked his sentence on the ground that the trial judge impermissibly increased his sentence because he rejected a plea bargain offer and elected to stand trial. The trial court offered a 20-year sentence if the defendant would plead guilty to the charge, but the defendant opted to stand trial. Upon conviction, he was sentenced to 33 years. The federal district court denied habeas corpus relief, but a three-judge panel of the Fifth Circuit reversed, finding that the defendant was penalized by the state court because he exercised his right to stand trial. The court later decided to rehear the case en banc "because of its potentially devastating impact upon the plea bargaining process." 646 F.2d at 875. A majority of the en banc court found that no constitutional rights were violated in the conviction and sentencing of the defendant.

In reaching its decision, the court noted the advantages of the plea bargaining process, which it found to expedite justice and to conserve judicial resources. 646 F.2d at 878. The court agreed with the defendant's assertion that a person cannot be punished simply for exercising his constitutional right to stand trial, but the court did not agree that the mere imposition of a longer sentence than defendant would have received had he pleaded guilty automatically constitutes such punishment. *Id.* at 883. A defendant is free to accept or reject the offer of the State. Once it is rejected, however, the defendant cannot complain that the denial of the benefits of the offer he rejected constitutes punishment or evidences judicial vindictiveness. "To accept such an argument is to

ignore completely the underlying philosophy and purpose of the plea bargaining system. If a defendant can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all the incentives to plea bargain disappear; the defendant has nothing to lose by going to trial." *Id.* at 883.

Alabama Court of Criminal
Appeals Opinion on Remand
From Alabama Supreme Court

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1988-89

3 Div. 574

James Lewis Smith

v.

State

Appeal from Montgomery Circuit Court

After Remand from the Alabama Supreme Court

McMILLAN, JUDGE

Pursuant to the Alabama Supreme Court's decision in *Ex parte Smith*, [Ms. 86-1448, April 8, 1988] ___ So.2d ___ (Ala. 1988), this cause is due to be remanded for resentencing.

REMANDED FOR PROPER SENTENCING.

ALL JUDGES CONCUR.

Order Staying Remand Pending
Outcome In This Court

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

3 Div. 574

James L. Smith

vs.

State of Alabama

Appeal from Montgomery Circuit Court No. CC85-1682-PR,
No. CC85-1683-PR and No. CC85-1684-PR

It is ordered, on motion of appellee, that this cause be and the same is hereby stayed pending decision of the United States Supreme Court on appellee's petion for writ of certiorari filed in that Court.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 31st day of January, 1989.

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA